

The Commission on Proceedings Involving Guy Paul Morin

REPORT
Volume 1



The Honourable
Fred Kaufman, C.M., Q.C.

1998

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on
Proceedings Involving
Guy Paul Morin

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The Commission on Proceedings Involving Guy Paul Morin

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L'hon. Fred Kaufman, c. r.
Commissaire



March 31, 1998.

The Honourable Charles A. Harnick, Q.C.
Attorney General
720 Bay Street
Toronto, ON
M5G 2K1

Dear Mr. Attorney:

Re: The Commission on Proceedings Involving Guy Paul Morin


Pursuant to Order in Council 1209/96, as amended by Order in Council 839/97,

I have the honour to present to you herewith my Report in the above matter.

Yours truly,

A handwritten signature in black ink, appearing to read "Fred Kaufman".

FRED KAUFMAN
Commissioner



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Acknowledgements

An inquiry of this nature and complexity cannot be undertaken without the input, help and dedication of a devoted group of people. I was fortunate that I had such a group.

Three senior lawyers accepted my invitation to act as Commission counsel: Austin M. Cooper, Q.C., described by his colleagues as the Dean of the Criminal Bar, his partner, Mark J. Sandler, a highly skilled criminal counsel, and Mary Anne Sanderson, an experienced and well-respected civil and commercial litigator. They approached the daunting task of marshaling thousands of pages of evidence with skill and determination. When Ms. Sanderson accepted a well-deserved appointment to the Ontario Court of Justice (General Division), her partner, Maureen B. Currie took her place, and the transition was smooth and the choice fortuitous.

Within hours of my appointment, Roland d'Abadie, assisted by Elizabeth Brooker, began to organize the facilities which I would need. Offices were found, two small hearing rooms — neither large enough to hold both counsel and the public — were converted, with speed and at minimal cost, into one room large enough to accommodate everyone, a media room was established, and arrangements were made to videotape the proceedings, and this became our permanent record.

We also were fortunate in the selection of research assistants: Jana Mills left her practice in Kingston to be with us 'for the duration.' Philip Downes and Michelle Rumble helped during major portions of the Inquiry. Christopher Sherrin produced a seminal paper on jailhouse informants, and he, Vincent Paris and Kenneth Dekker assisted during subsequent stages of the Commission. For the first three months we were fortunate to have the expertise of Debra Bilous, who helped us organize the mass of materials which had to be gathered and computerized. The work of all was of the highest quality and I am grateful to them.

Throughout the Inquiry we had the excellent support of Mary Bandiera, court registrar, Merv Buck, court services officer, Sam Lewis and Carlyle Innes, security officers, and the 'backroom staff,' Simone Dhola, Krystina Krywoj, Marilyn McKendrick, Nicole Niles, Isabelle Riser, Olek Sidor, Margaret Thomas and Dawn Yager. They patiently and with great efficiency did what had to be done, and often a great deal more. Jim Matthews, of Van Valkenburg Communications, was our operator/technician, and he made sure that both the audio and video equipment captured all the

participants. Lisa Noble cheerfully assisted the legal staff during the final stages.

I am grateful to Nancy Austin, who was designated by the Ministry of the Attorney General to be the liaison officer between the Ministry and the Commission. It was a pleasure to work with her. I also wish to thank all counsel who appeared before me. They were unfailingly efficient, helpful and courteous, and this spirit of co-operation greatly facilitated my task.

While the findings, conclusions and recommendations set out in this Report are mine, I could not have achieved this result without the help of my staff, and I thank them all for their devotion. Finally, on a personal note, I would like to record my gratitude to my wife, Donna, whose understanding, support and forbearance throughout the Commission meant a great deal to me.

**THE COMMISSION ON PROCEEDINGS
INVOLVING GUY PAUL MORIN**

GENERAL CHRONOLOGY

EVENTS PRIOR TO THE 1st TRIAL

October 3, 1984	Christine Jessop goes missing.
December 31, 1984	Christine Jessop's remains are discovered in Durham Region.
January 2, 1985	Dr. Hillsdon-Smith performs an autopsy on the body of Christine Jessop.
February 22, 1985	Guy Paul Morin is interviewed by Officers Fitzpatrick and Shephard.
April 22, 1985	Guy Paul Morin is arrested.
June 17, 1985	Guy Paul Morin's Application for Judicial Interim Release is denied by Holland J.
June 24-26, 1985	Preliminary Inquiry before Edmondson P.C.J. Morin is committed for trial on a charge of first degree murder.
November 15, 1985	Motion for disclosure heard by Sutherland J.
November 27, 1985	Sutherland J. releases reasons on disclosure application.

FIRST TRIAL PROCEEDINGS

January 7, 1986

Commencement of first trial in London before Craig J.

February 7, 1986

Guy Paul Morin is acquitted of first degree murder. He is released from custody.

COURT OF APPEAL PROCEEDINGS (No. 1)

March 4, 1986

Notice of Appeal filed by the Crown to Ontario Court of Appeal.

June 5, 1987

Court of Appeal for Ontario allows the Crown appeal and orders new trial. Morin is returned to custody a few days later.

SUPREME COURT OF CANADA PROCEEDINGS

June 8, 1987

Morin files Notice of Appeal to Supreme Court of Canada.

June 18, 1987

Pending his appeal to the Supreme Court of Canada, Guy Paul Morin is released on bail by order of Brooke J.A. of the Court of Appeal for Ontario.

Nov. 17, 1988

The Supreme Court of Canada dismisses Morin's appeal and affirms the order for a new trial.

April 6, 1990

Morin files a Notice of Application in the Supreme Court of Canada for a re-hearing of the appeal or a stay of the re-trial.

May 14, 1990

Morin's Application is dismissed by the Supreme Court of Canada.

2nd TRIAL PROCEEDINGS

May 28, 1990-

The stay & "open box" disclosure motion in London is heard

February 8, 1991

before Donnelly J. The motions are dismissed.

October 31, 1990

Christine Jessop's body is exhumed.

October 31, 1990 -

A post-exhumation examination and second autopsy is

November 2, 1990

performed on the body of Christine Jessop.

March 8, 1991

The Supreme Court of Canada dismisses Guy Paul Morin's second application for a re-hearing of the appeal.

April 2, 1991 -

Various pre-trial motions are heard before Donnelly J.

August 27, 1991

November 13, 1991

The Crown delivers its opening address to the jury.

July 30, 1992

Guy Paul Morin is convicted of first degree murder and is detained in custody.

COURT OF APPEAL PROCEEDINGS (No. 2)

August 22, 1992

Morin files an inmate's Notice of Appeal to the Court of Appeal for

Ontario.

November 30, 1992

A Solicitor's Notice of Appeal is filed in the Court of Appeal for Ontario.

February 9, 1993

Bail Pending Appeal is granted in the Court of Appeal for Ontario by Catzman J.A.

March 11, 1994

An amended Notice of Appeal containing 181 grounds of appeal is filed in the Court of Appeal for Ontario.

January 23, 1995

Guy Paul Morin's appeal to the Court of Appeal for Ontario is allowed. The conviction is set aside and a verdict of acquittal entered.

June 26, 1996

By Order in Council, the Commission on Proceedings Involving Guy Paul Morin is established. The Honourable Fred Kaufman Q.C. is appointed as the Commissioner.

I

The Scope and Nature of the Inquiry

A. Introduction

On July 30, 1992, an innocent person was convicted of a heinous crime. The man was Guy Paul Morin and the crime was the first degree murder of nine-year old Christine Jessop, abducted from Queensville, Ontario, on October 3, 1984. It was not until January 23, 1995, almost 10 years after he was first arrested, that Guy Paul Morin was exonerated as a result of sophisticated DNA testing not previously available.

The criminal proceedings against Guy Paul Morin represent a tragedy not only for Mr. Morin and his family, but also for the community at large: the system failed him — a system for which we, the community, must bear responsibility. An innocent man was arrested, stigmatized, imprisoned and convicted. The real killer has never been found. The trail grows colder with each passing year. For Christine Jessop's family there is no closure.

The reasons for the failure are set out in the pages which follow, and so are suggestions for change, designed to make similar failures less likely.

B. The Mandate

(i) Overview

By Order in Council dated June 26, 1996, I was appointed as

Commissioner pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41.

The preamble to the Order in Council reads, in part, as follows:

Christine Jessop was murdered on or after October 3rd, 1984. Guy Paul Morin was charged on April 22nd, 1985 with that murder. On February 7th, 1986, he was acquitted. A new trial was ordered by the Court of Appeal for Ontario on June 5th, 1987 and that order was affirmed by the Supreme Court of Canada on November 17th, 1988. After the new trial, he was convicted of her murder on July 30th, 1992. He was subsequently acquitted by the Court of Appeal on January 23, 1995 on the basis of fresh evidence tendered by the Crown and defence counsel. This course of events has raised certain questions about the administration of criminal justice in Ontario.

My mandate is described in these terms:

1. The Commission shall inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre of Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop. The Commission shall report its findings, and make such recommendations as it considers advisable relating to the administration of criminal justice in the province.
2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation relating to the murder of Christine Jessop, or any ongoing criminal or civil proceedings.
3. The Commission shall complete this inquiry and deliver its final report containing its findings, conclusions and recommendations to the Attorney

General by June 30, 1997.¹ The Commission may give the Attorney General such interim reports as it considers appropriate to address urgent matters in a timely fashion. Each report must be in a form appropriate for release to the public, subject to the *Freedom of Information and Protection of Privacy Act* and other relevant laws.

4. To the extent that the Commission considers advisable, it may rely on any transcript or record of pretrial, trial or appeal proceedings before any court in relation to the proceedings and prosecution and on such other related materials as the Commission considers relevant to its duties. (See *Order in Council dated June 26, 1996, Appendix A-1*)

Immediately after Guy Paul Morin was exonerated on January 23, 1995, the then Deputy Attorney General, speaking on behalf of the Attorney General, said this, in part:

The minister is deeply committed to maintaining the public's faith in the system, and to ensuring that the ministry takes whatever steps are necessary that such a situation does not reoccur. To accomplish this, Ms. Boyd has decided a public airing into the justice system's handling of Mr. Morin's case is required.

These sentiments were echoed when the present Attorney General announced the appointment of this Commission. He said this, in part:

An inquiry cannot wipe away the years of pain and turmoil Mr. Morin suffered, but it can examine the complex circumstances surrounding the case, and allow us to learn from it and prevent any future miscarriage of justice.

It follows from the Order in Council (and the comments cited above) that the mandate of this Commission is threefold: investigative, advisory and educational. Each aspect requires some elaboration.

¹ This date was later changed to March 31, 1998.

(ii) The Investigative Role

I am to investigate and determine, to the extent possible, why the investigation into the death of Christine Jessop and the proceedings which followed resulted in the arrest and conviction of an innocent person. In other words, how and why did the administration of justice fail *in this case*? Guy Paul Morin is entitled to have an answer to that question, and so is the public at large.

To fulfill my investigative role, I am entitled to make findings of fact. Sometimes, these findings involve the credibility of witnesses. From those findings of fact, I am entitled "to draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it."²

In the *Red Cross* case, Cory J., speaking for a unanimous Supreme Court of Canada, said this:

[C]ommissioners must ... have the necessary authority to set out the facts upon which the findings of misconduct are based, even if those facts reflect adversely on some parties. Otherwise, the inquiry process would be essentially pointless. Inquiries would produce reports composed solely of recommendations for change, but there could be no factual findings to demonstrate why the changes were necessary. If an inquiry is to be useful in its roles of investigation, education and the making of recommendations, it must make findings of fact. It is these findings which will eventually lead to the recommendations which will seek to prevent the recurrence of future tragedies.³

.....

These findings of fact may well indicate those individuals and organizations which were at fault. Obviously, reputations will be affected. But damaged reputations may be the price which must be paid to

² *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (hereinafter referred to as the *Red Cross* case).

³ *Red Cross* at 462.

ensure that if a tragedy such as that presented to the Commission in this case can be prevented. ... [C]ommissioners must have the authority to make those findings of fact which are relevant to explain and support their recommendations even though they reflect adversely upon individuals.⁴

.....

[T]he power of commissioners to make findings of misconduct must encompass not only finding the facts, but also evaluating and interpreting them. This means that commissioners must be able to weigh the testimony of witnesses appearing before them and to make findings of credibility. This authority flows from the wording of s.13 of the Act, which refers to a commissioner's jurisdiction to make findings of "misconduct". According to the *Concise Oxford Dictionary* (8th ed. 1990), misconduct is "improper or unprofessional behaviour" or "bad management". Without the power to evaluate and weigh testimony, it would be impossible for a commissioner to determine whether behaviour was "improper" as opposed to "proper", or what constituted "bad management" as opposed to "good management". The authority to make these evaluations of the facts established during an inquiry must, by necessary implication, be included in the authorization to make findings of misconduct contained in s.13. Further, it simply would not make sense for the government to appoint a commissioner who necessarily becomes very knowledgeable about all aspects of the events under investigation, and then prevent the commissioner from relying upon this knowledge to make informed evaluations of the evidence presented.⁵

These comments have equal application to section 5 of the *Public Inquiries Act (Ontario)* which addresses findings of misconduct which may be made.

⁴ *Red Cross* at 462-463.

⁵ *Red Cross* at 463.

Pursuant to my mandate, I have made findings of fact in this Report, including, where appropriate, findings of misconduct. In doing so, I was governed, in part, by the following principles which find expression in the *Public Inquiries Act*, the terms of my Order in Council and the relevant jurisprudence, most particularly the *Red Cross* case, cited above:

1. The Order in Council provides that “[t]he Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.” The jurisprudence supports this prohibition. Accordingly, I have no jurisdiction to make any findings of criminal or civil responsibility and I have refrained from doing so. Each of my findings must be read in the context of this prohibition.
2. As noted by Cory J. in *Red Cross*, findings of misconduct “should be made only in those circumstances where they are required to carry out the mandate of the inquiry.”⁶ Any findings of misconduct which I have made shed light on how this miscarriage of justice occurred and explain and support my recommendations as to how to avoid future miscarriages of justice.
3. Subsection 5(2) of the *Public Inquiries Act* provides that no finding of misconduct on the part of any person shall be made against the person unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the Inquiry to be heard in person or by counsel. Accordingly, I have only made findings of misconduct against named persons where that person received written notice of the substance of the alleged misconduct (referred to herein as a ‘section 5 notice’) and had a full opportunity during the Inquiry to be heard.
4. The rules of procedure which govern public inquiries generally, and this Inquiry in particular, permit the reception of evidence which might not meet the strict test for

⁶ *Red Cross* at 470.

admissibility in criminal or civil proceedings. My approach at this Inquiry was to receive such evidence primarily where it related to systemic issues, rather than issues of personal or institutional misconduct. In making findings of misconduct, I relied heavily, by analogy, upon the principles which govern the admissibility of evidence in criminal proceedings. Generally, a relaxation of those principles favoured a party against whom misconduct was alleged. Having said that, I respectfully adopt the following comments of Cory J. in the *Red Cross* case as reflecting the principles which govern my Report:

A public inquiry was never intended to be used as a means of finding criminal or civil liability. No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural safeguards which prevail at a trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability not only should not be made, they cannot be made.

Perhaps commissions of inquiry should preface their reports with the notice that the findings of fact and conclusions they contain cannot be taken as findings of criminal or civil liability. A commissioner could emphasize that the rules of evidence and the procedure adopted at the inquiry are very different from those of the courts. Therefore, findings of fact reached in an inquiry may not necessarily be the same as those which would be reached in a court. This may help ensure that the public understands what the findings of a commissioner are — and what they are not.⁷

5. In assessing credibility, I also relied, by analogy, on the considerations relevant to a trial judge presiding in a criminal case. These include the demeanour of witnesses, the plausibility of evidence measured both internally and in relation to other evidence, prior statements or testimony, and the motivations and possible unconscious biases of parties. I

⁷ *Red Cross* at 470-471.

have also considered that these biases may change as events develop. For example, a witness whose trial evidence was coloured by Guy Paul Morin's status as an accused murderer may now give evidence coloured by knowledge of Mr. Morin's proven innocence. The criminal records or discreditable conduct of some witnesses may affect their credibility. The good reputations of parties against whom misconduct is alleged have been considered by me both in relation to their credibility and to the unlikelihood that the alleged misconduct would be committed by them. A number of parties led character evidence during the Inquiry, either through witnesses otherwise testifying on relevant issues, or through character witnesses or letters filed during Phase VI of the Inquiry. I have considered the excellent prior reputations of various parties against whom allegations of misconduct have been made in assessing the evidence.

6. I am entitled to make findings of fact which are demonstrated to my satisfaction on the balance of probabilities. However, where findings involve misconduct of named parties, potentially affecting reputations and professional standing, a higher degree of proof, closer to the criminal standard, is appropriate. This approach accords with the jurisprudence in this area which speaks of clear and convincing proof, based upon cogent evidence.⁸

Not surprisingly, the public is often most interested in the findings of misconduct made against individuals or organizations. However, as important as the Inquiry's investigative, advisory and educational roles are, as Cory J. noted, they "should not be fulfilled at the expense of the denial of the rights of those being investigated. ... [N]o matter how important the work of the inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly."⁹ The limitations upon findings of misconduct must be understood in the light of these expressed concerns.

⁸ *Re Bernstein and College of Physicians and Surgeons* (1977), 76 D.L.R. 38 at 76 (Ont. Div.Ct.).

⁹ *Red Cross* at 458-459.

(iii) The Advisory Role

The principal focus of my mandate is to make recommendations for change intended to prevent future miscarriages of justice. The criminal proceedings against Guy Paul Morin have enabled me to identify certain 'systemic issues' — that is, issues which transcend the particular case and speak generally to the administration of criminal justice in Ontario. Pursuant to my mandate, I have made 119 recommendations for change. In doing so, I was governed by the following principles, which again find expression in the *Public Inquiries Act*, my Order in Council, and the jurisprudence:

1. As previously noted, the Order in Council prohibits me from expressing any recommendation regarding the civil or criminal responsibility of any person or organization. I am, therefore, not entitled to recommend that criminal, civil or disciplinary proceedings should or should not be instituted against any person.
2. Any recommendations should be reasonably related to the systemic issues arising out of the present case. Nevertheless, some recommendations may address problems not directly associated with Mr. Morin's wrongful conviction, but which were incidentally identified during the Inquiry.
3. Any recommendations should be practical and constructive.
4. It is my mandate to make recommendations to improve the administration of criminal justice *in Ontario*. My Report is, by law, directed to the Attorney General of Ontario. I have been mindful of this provincial limitation in prioritizing issues and formulating recommendations. But criminal trials and the administration of criminal justice also raise national issues of importance since criminal law, procedure and evidence fall within federal jurisdiction. Some issues raised during this Inquiry are of such importance that I feel compelled to address them in some way — in the least, by identifying the issues and the need for attention and, in some instances, by recommending changes that can only be implemented by the federal government, but which can and

should be furthered through proactive representations by the Government of Ontario to the Government of Canada.

The Order in Council authorized me to submit such interim reports as I may consider appropriate to address urgent matters in a timely fashion. I chose not to submit interim recommendations, though matters did arise during the Inquiry which clearly required immediate remedial action. Given the structure of this Inquiry, any interim report would have been submitted without the benefit of the systemic evidence from experts from around the world heard near the end of the Inquiry, or the closing written and oral submissions of counsel. I therefore suggested early on that parties need not await my final Report before taking action to rectify problems made evident in the course of the Inquiry; indeed, parties were encouraged to take such action and several did. For example, Dr. James Young, Chief Coroner for Ontario and Assistant Deputy Solicitor General with responsibility for the Centre of Forensic Sciences, testified that, as he became aware of the unexpected depth of the problems identified by this Inquiry, certain remedial action was taken, together with action which had commenced prior to the Inquiry. Similarly, the Ministry of the Attorney General filed Crown policy guidelines addressing jailhouse informants, forensic evidence and the role of Crown counsel¹⁰ influenced, in part, by the evidence revealed at this Inquiry. The Durham Regional Police Service described remedial actions taken in response to the Inquiry's evidence as well. To their credit, these and other parties appreciated that such remedial actions would be evaluated by me, with the view to making recommendations for further or other action.

(iv) The Educational Role

This public Inquiry may serve to educate members of the community as to the administration of criminal justice generally and as to the criminal proceedings against Guy Paul Morin in particular. A public Inquiry is, by definition, public. Fulfillment of the Inquiry's educational role and public confidence in the effectiveness and independence of the Inquiry rest, in large measure, upon the openness of the Inquiry. Accordingly, though section 3 of the *Public Inquiries Act* empowered me to hold *in camera* hearings and, by

¹⁰ The terms Crown attorney, Crown counsel, and prosecutor are often used interchangeably in this Report, and include Crown attorneys of all ranks; most Ontario prosecutors are, in fact, Assistant Crown Attorneys.

necessary implication, to ban publication of evidence, it was a power to be used sparingly. Indeed, no *in camera* proceedings were conducted by me and no bans on publication were imposed by me. On occasion, the names of third parties, addresses or other sensitive or personal information irrelevant to my mandate were deleted from exhibits filed or questions to be posed. This was invariably done with the consensus and co-operation of all counsel.

Members of the media attended throughout the Inquiry. A single camera recorded the proceedings; the videotapes constitute the official record of the Inquiry. The hearing room was fully accessible to the public and the media. A separate media room was also provided, to which a direct audio-visual feed was available at all times. The exhibits (and the full public record of the criminal proceedings against Guy Paul Morin) were contained in a library accessible to the public and the media.

At Guy Paul Morin's second trial, the trial judge, Mr. Justice James Donnelly, imposed bans on the publication of the identities of certain persons, most significantly, one of the jailhouse informants who testified against Guy Paul Morin — referred to at this Inquiry by the pseudonym Mr. X. I have no jurisdiction to reverse a judicially imposed publication ban. (See *Ruling dated November 29, 1996, Appendix B.*) This ban on publication was unsuccessfully challenged in the Ontario Court of Appeal.¹¹ Accordingly, the pseudonym 'Mr. X' continues to be used throughout this Report. The media respected this ban on publication; for example, Mr. X's image and voice were artificially distorted in the television media to maintain his anonymity. Members of the public were entitled to attend the Inquiry during Mr. X's evidence and did so. Though I expressed my preference that the ban on publication respecting Mr. X be lifted, the ban did not impede the Inquiry in any significant way.

C. The Innocence of Guy Paul Morin

On January 23, 1995, the Ontario Court of Appeal convened to hear Guy Paul Morin's appeal against his first degree murder conviction. Fresh

¹¹ *Ontario (Commission on Proceedings involving Guy Paul Morin) (Re)* (1997), 113 C.C.C. (3d) 31 (Ont. C.A.).

evidence of the comparison of semen found on Christine Jessop's panties to Guy Paul Morin's DNA profile demonstrated to the complete satisfaction of a panel of experts representing the prosecution, the defence and the Court that Mr. Morin was not the donor of the semen. This evidence was presented to the Court which, in short order, acquitted Guy Paul Morin.

That day, in addressing the Court, Kenneth L. Campbell, senior Crown counsel, said in part, "The evidence proves as an indisputable scientific fact that Mr. Morin is not guilty of the first degree murder of Christine Jessop, and should be acquitted."

Upon the acquittal having been entered, Mr. Campbell, again in open Court and on behalf of the Ministry of the Attorney General, expressed to Mr. Morin and his family "... our deepest regret for all that they have had to endure." He also publicly acknowledged "the anguish that has been suffered by the Jessop family for the loss of their daughter, Christine, and the continuing hardship caused to them by the uncertainty surrounding the identity of her killer."

Later that day, the Deputy Attorney General, speaking on behalf of the Attorney General (who was attending a meeting in Victoria, B.C.), said, in part, as follows: "Mrs. Boyd has asked me to express her deep regret to Mr. Morin and his family for what they have had to endure over the last years. She cannot imagine a more personally arduous experience."

Mr. McGuigan, the senior prosecutor at Guy Paul Morin's second trial, also expressed regrets to Guy Paul Morin and his family at a press conference that day.

Despite these public acknowledgements, early in this Inquiry, there were undoubtedly some who still believed, despite Guy Paul Morin's exoneration through DNA testing, that he was nonetheless guilty. Perhaps, it was said, he committed the crime with others; perhaps the DNA testing was flawed. As the evidence which supported his conviction was revisited at this Inquiry, the case against Guy Paul Morin unraveled before our very eyes. Hair and fibre evidence, thought by prosecutors to be the strongest evidence against Mr. Morin, was shown to be contaminated and, apart from that contamination, worthless in demonstrating guilt when properly understood. Other evidence suffered a similar fate.

In the course of the Inquiry, several witnesses publicly apologized to Guy Paul Morin for any involvement on their part in his wrongful conviction. These apologies were widely reported. Apologies offered by Susan MacLean, one of the Morin prosecutors, Inspector John Shephard, a lead Durham investigator, retired Superintendent Robert Brown, Durham's senior officer in charge, and Trevor McCagherty, the Durham Chief of Police were particularly memorable.

These apologies offered a measure of closure to Guy Paul Morin. Equally important, the evidence tendered at this Inquiry, together with these apologies, should have demonstrated unequivocally to the public that Guy Paul Morin is indeed, beyond a shadow of a doubt, an innocent person. As James Treleaven Q.C., himself a seasoned prosecutor, noted in his evidence:

[M]y suspicion is that ... some people at the start of this Inquiry still harboured lingering doubts about [Mr. Morin], and I think that one of the useful functions this Commission has served is to make it clear. I mean, nobody could sit, as I have, through day after day of this evidence ... without saying: How can there be any doubt?

Though this was not one of the stated purposes of the Inquiry, I am pleased that the Inquiry may have served to support and explain Guy Paul Morin's innocence to many members of the public.

D. The Ongoing Police Investigation

As previously noted, the Order in Council reflects that the Commission must "perform its duties ... without interfering in any ongoing police investigation relating to the murder of Christine Jessop or any ongoing criminal or civil proceedings." The current investigation of Christine Jessop's murder is being conducted by the Metropolitan Toronto Police. As a result, many of the documents which were relevant to this Inquiry were in the possession of the Metropolitan Toronto Police. Commission counsel and the Metropolitan Toronto Police Force established a protocol regulating the acquisition, preservation and return of documentation (and related computer data) needed by the Commission. This enabled the Commission to provide full disclosure to all parties at the Inquiry, without compromising the

Christine Jessop or other ongoing investigations, the legitimate privacy interests of third parties or the continuity of original materials. I wish to extend my appreciation to Acting Inspector Neale T. Tweedy, Acting Detective Sergeant Steve Hulcoop, Acting Detective James Makris, and Jerome Wiley, Q.C., counsel to the Metropolitan Toronto Police Force, for their assistance in resolving many issues which arose during this Inquiry. (See *Exchange of Correspondence dated January 31, 1997, and February 3, 1997, Appendix C.*)

My mandate is not directed to identifying the killer of Christine Jessop. However, much of the evidence at this Inquiry may have relevance to any further investigation. Accordingly, Commission counsel will continue to work with the Metropolitan Toronto Police Force to facilitate their access to the materials accumulated during the Inquiry.

E. Standing

Section 5(1) of the *Public Inquiries Act* provides as follows:

A Commission shall accord to any person who satisfies it that the person has a *substantial and direct interest* in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest. (Emphasis added.)

On September 4, 1996, I commenced hearing applications for standing at the Inquiry. I immediately granted standing to the following individuals or entities:

- The Attorney General of Ontario
- The Centre of Forensic Sciences and persons employed by or associated with the Centre
- The Chief Coroner for Ontario and persons employed by or associated with that office

- Bernie Fitzpatrick (formerly Staff Sergeant, Durham Regional Police Service)
- Gordon Hobbs (Metropolitan Toronto Police Force, formerly seconded to the Durham Regional Police Service)
- Janet, Kenneth and Robert Jessop¹²
- Susan MacLean (prosecutor at Guy Paul Morin's first and second trials)
- Leo McGuigan, Q.C. (senior prosecutor at Guy Paul Morin's second trial)
- Sergeant Michael Michalowsky (formerly identification officer, Durham Regional Police Service)
- Guy Paul, Alphonse and Ida Morin
- John D. Scott Q.C. (senior prosecutor at Guy Paul Morin's first trial)
- John Shephard (formerly Inspector, Durham Regional Police Service)¹³
- Alex Smith (prosecutor at Guy Paul Morin's second trial)
- Ministry of the Solicitor General and Correctional

¹² Robert Jessop applied for, and was granted, standing subsequent to the original application by Janet and Kenneth Jessop.

¹³ Mr. Shephard actually held the rank of Detective in 1985. He was promoted to the rank of Inspector before the second trial. In order to avoid confusion, and because his rank at any particular point in time has no bearing on the issues before the Commission, he will be referred to as Inspector Shephard throughout the Report.

Services and persons employed by or associated with
the Ministry

I subsequently granted standing to the following individuals or entities, with the limitations expressed below. (See *Reasons dated September 25, 1996, November 12, 1996, and letter dated January 23, 1997, to CBA-Ontario, Appendix D*):

- Association in Defence of the Wrongly Convicted (AIDWYC) — on systemic issues only
- Criminal Lawyers' Association — on systemic issues only
- Ontario Crown Attorneys' Association — on systemic issues only
- Durham Regional Police Association — on systemic issues only, except insofar as the Association's counsel also had a mandate to represent four specific officers, Joseph Loughlin, Robert Chapman, Thomas Cameron and David Robinet, each of whom were entitled to full standing
- York Regional Police Association — on systemic issues only, except insofar as the Association's counsel also had a mandate to represent specific officers whose conduct may be examined
- Chief of Police and York Regional Police Board — the latter, on institutional issues only, except insofar as their counsel also had a mandate to represent senior officers whose conduct may be examined and who are not represented by the York Regional Police Association
- Durham Regional Police Board — on institutional issues only, except insofar as its counsel also had a mandate to represent senior officers whose conduct

may be examined and who are not represented by the Durham Regional Police Association

- Canadian Bar Association — Ontario — on systemic issues only, limited further to particular Phases of the Inquiry
- Law Union — on systemic issues only, limited to closing submissions only¹⁴
- Mr. X (jailhouse informant¹⁵ and witness) — limited to the Phase(s) of the Inquiry which directly concerned him
- Robert Dean May (jailhouse informant and witness) — limited to the Phase(s) of the Inquiry which directly concerned him

During the submissions as to standing, some counsel suggested that entities seeking standing, particularly on systemic issues, would attempt to intrude into the factual issues relating to the Guy Paul Morin proceedings, or unduly lengthen the Inquiry. Similarly, concerns were expressed that certain common interests (for example, on behalf of the police) would be unnecessarily and unfairly duplicated through the granting of standing not only to individual officers but also to police associations and boards. Underlying these submissions — which, ironically, emanated from strikingly divergent parties — was the concern that there be no imbalance of representation at the Inquiry or ‘ganging up’ on certain parties by others. These concerns proved unwarranted. Counsel for all parties demonstrated a high degree of professionalism, avoiding duplication, while serving their respective clients extremely well. The parties to the systemic issues called much of the evidence during Phase VI of the Inquiry (the systemic phase), sometimes in shared panel presentations, and did so in a truly non-adversarial

¹⁴ The Law Union ultimately chose not to participate directly. Its counsel appeared on behalf of AIDWYC for part of the Inquiry.

¹⁵ The terms ‘in-custody informer’ and ‘jailhouse informant’ are used interchangeably, unless otherwise indicated, throughout this Report.

and co-operative manner.

In my written reasons released on September 25, 1996, I reflected that “[i]t is my hope that the work of the Commission will proceed efficiently and with dispatch, but this can only be achieved with the full co-operation of all the parties concerned ... I have spelled out some limitations, and my purpose in doing so is to avoid costly and time-consuming duplication and prevent unfairness. I know I can count on the help of all parties to achieve this result.” I can now say that the timely completion of this Inquiry, together with the high quality of representation throughout, is a tribute to all counsel who appeared before me.

F. Funding

The funding of counsel for parties granted standing at the Inquiry proved to be a contentious issue. Ultimately, counsel for parties with standing were indeed funded, but in different ways. Counsel for several parties (the Morins, the Jessops, Robert Dean May and Mr. X) were funded by the provincial government at civil legal aid rates. Their accounts were submitted to me for review and approval, a task which I delegated, in part, to the Administrator. Counsel for several parties granted standing on systemic issues (AIDWYC, Criminal Lawyers’ Association, Ontario Crown Attorneys’ Association, Canadian Bar Association — Ontario) were allocated monies by me out of a fund established as part of the Commission’s budget for that purpose. Counsel for the remaining parties were funded by their clients or, in a number of instances, by the clients’ present or former employers. For example, it is my understanding that the Regional Municipality of Durham funded some of the parties, including present or former Durham police officers, who were granted standing. (I am aware that there was, and may still be, an issue between the municipal and provincial governments as to the level of government that should be responsible for this funding.)

The issue of funding threatened to derail the Inquiry in its earliest stages. I was gratified, however, that the issue was resolved to the extent that each of the parties before me was represented and that the representation was highly skilled. In saying that, I recognize that some counsel appeared at civil legal aid rates for an extended period of time, well below their usual compensation, and I am grateful for their indispensable contribution to the

Inquiry's work. Similarly, I recognize — and appreciate — that some counsel who were allocated limited monies by me out of the Commission's budget, worked many hours for which they were not financially compensated. Their contribution, both in the interests of their client organizations and in the public interest, was in the finest traditions of the bar.

Parties granted standing during a public Inquiry inevitably have, as set out in the *Public Inquiries Act*, a 'substantial and direct interest' in all or part of the proceedings. Their role is of fundamental importance to the success of any Inquiry. The ability of a Commission to investigate, advise and educate is greatly dependent on the contribution of counsel. That is why I stated at the outset that, "[t]o effectively and properly discharge my mandate, it is essential that parties granted standing have adequate funds to be properly represented by counsel."

Recommendation 1: Policy for Funding Inquiries.

A clear and comprehensive policy should be established by the Government of Ontario for the funding of public inquiries, consistent with the concerns expressed herein.

G. Rules of Procedure

The hearings were governed by rules of procedure established after consultation with all parties and submissions before me. The rules were largely arrived at through consensus.

During the Inquiry, I did, on occasion, relieve against the strict application of the rules to ensure fairness to all parties. It is a tribute to all counsel that, despite strongly held positions on the issues before me, they were extremely accommodating to each other and to me, and it is fair to say that the rules worked well. (See *Rules of Procedure, Appendix E.*)

H. Disclosure and Documentary Access

Commission counsel established various protocols to collect, catalogue, disclose and, where applicable, return documentary material.

Similarly, protocols were established to enable the disclosure of anticipated evidence. These protocols are largely contained in memoranda issued by Commission counsel to all counsel at the Inquiry. (See *various memoranda, Appendix F.*)

I. Phases of the Inquiry

The public hearings proceeded in phases. At the commencement of each Phase, Commission counsel outlined the background facts and the systemic issues likely to arise out of those of facts. These phases were organized as follows:

Phase I — In-Custody Statements/ Jailhouse Informants

At the first and second trials, the prosecution led evidence of an incriminating statement allegedly made by Guy Paul Morin in the presence of his cellmate Robert Dean May and allegedly overheard by Mr. X in the adjoining cell. Phase I examined the issues arising out of this statement tendered through the two jailhouse informants at trial.

Phase II — Forensic Evidence and the Centre of Forensic Sciences

At the first and second trials, the prosecution led the evidence of forensic scientists from the Centre of Forensic Sciences, primarily concerning comparisons between hairs and fibres from the body site and hairs and fibres from Guy Paul Morin, his residence and vehicle. Evidence of ‘indications’ of blood in the Morin vehicle was also led. As well, the results of two autopsies respecting Christine Jessop were introduced into evidence. The issue of forensic pathology is dealt with in a later chapter. This Phase examined the issues arising out of the forensic evidence tendered at the trials.

Phase III — The York Regional Police Investigation

When Christine Jessop disappeared, the initial investigation was conducted by officers of the York Regional Police force which had jurisdiction in the area in which she had lived. When her body was

discovered on December 31, 1984, the homicide investigation was assumed by the Durham Regional Police Service, in whose jurisdiction her body was located. Two York Regional Police officers were assigned to the Durham investigation thereafter. This Phase examined the issues arising out of the York Regional Police investigation.

Phase IV — The Durham Regional Police Investigation

The Durham Regional Police investigation commenced on December 31, 1984, when Christine Jessop's body was discovered in Durham Region. It extended through Guy Paul Morin's arrest on April 22, 1984, by Durham investigators, his first trial, which resulted in his acquittal, the period during which a new trial was ordered by the Ontario Court of Appeal and upheld by the Supreme Court of Canada, until July 30, 1992, when he was convicted at his second trial. This Phase examined the issues arising out of the Durham Regional Police Service investigation.

Phase V — The Trial

This Phase examined issues arising out of the trial of Guy Paul Morin, most particularly the second trial, since it resulted in his wrongful conviction.

Phase VI — Systemic Issues

At the end of the evidence particular to the Christine Jessop investigation and Guy Paul Morin criminal proceedings, a number of systemic issues were identified — issues that transcend the facts of the Morin case and extend to the administration of criminal justice in Ontario generally. During Phase VI, I heard evidence from experts and participants in the administration of criminal justice from around the world. These witnesses were, with few exceptions, completely uninvolved in the Guy Paul Morin case; they were tendered to assist me in formulating recommendations for systemic change. I also heard evidence from six individuals from England, the United States and Canada, who were wrongfully convicted and later exonerated, and who offered a sobering reminder of the objectives of this Inquiry. This Phase was designed to examine the systemic issues in a completely non-adversarial way. To that end, counsel were precluded from questioning systemic witnesses on the contentious factual issues relating to the Guy Paul Morin case itself.

Phase VII — Section 5 Phase

Section 5 of the *Public Inquiries Act* provides as follows:

(1) A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

(2) No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.

Early in the Inquiry, section 5 notices were served confidentially upon various parties. They were supplemented or amended as the evidence unfolded. Commission counsel met with counsel for such parties to provide any needed clarification. These clarifications were reduced to writing and were treated as if they formed part of the notices themselves. The allegations contained in the notices did not represent the views of Commission counsel (who prepared them) or my views, but rather represented allegations of misconduct contained in the public record. Not every allegation contained in the public record was necessarily included in these notices. Some prioritization was established.

This Phase was designed to enable parties who received section 5 notices to lead any evidence bearing upon allegations contained in their notices.

Phase VIII — Written and Oral Submissions

All parties were permitted to file written submissions, without limitations on length, on the factual and systemic issues raised during the Inquiry. Consensus was reached as to when each factum had to be filed, together with reply facta. I then heard oral submissions from the parties. Again, consensus was reached as to the times allocated for oral submissions.

(See memoranda from Commission counsel, Appendix G.)

J. Breadth of the Factual Issues

As may be clear from the above recital of the Phases, the number of factual issues which arose out of the Guy Paul Morin criminal proceedings was very large indeed. Prior to the commencement of the public hearings, the Commission accumulated transcripts from the first trial (1,839 pages), the second trial (77,800 pages), fresh evidence materials (21,400 pages) and summaries of the documentary evidence (which commission staff prepared), all relating to the Christine Jessop investigation and Guy Paul Morin prosecutions and appeals for the period of more than 10 years from October 1984 to January 1995. The legal issues raised by counsel for Guy Paul Morin and the Attorney General of Ontario, in relation to the appeal against conviction, consumed 19 volumes of facta. (The public record was later augmented by the *viva voce* evidence tendered at this Inquiry (146 volumes) and the documentary evidence filed as exhibits (311 exhibits).

As earlier noted, the Order in Council directed me to "complete this inquiry and deliver [my] final report containing [my] findings, conclusions and recommendations to the Attorney General by June 30, 1997," that is, one year after I was given the mandate.

Public hearings commenced on February 10, 1997, with opening statements by Commission counsel. Evidence was then called.

By letter dated April 11, 1997, directed to the Honourable Charles A. Harnick, Q.C., Attorney General of Ontario, I requested that the completion date of the Inquiry be extended *once and only once* to March 31, 1998. (See *Letter dated April 11, 1997, Appendix H.*) This letter read, in part, as follows:

This request is consistent with the breadth of the inquiry mandate, fiscal responsibility, and the commencement date of the public hearings. Indeed, it is my view that this request should not be seen as a prolongation of the ongoing process, but rather an acknowledgment of the significant amount of work, requiring the co-operation of many parties, needed before the public hearings could begin.

The Order in Council contemplated a one year period commencing in June, 1996. However, the public hearings only commenced seven and a half months later. During that period, the commission offices were established, commission staff, including commission counsel, were retained and facilities were renovated to accommodate the multiple parties with standing and daily participation of television, radio and print media. A decision was made that time expended 'up front' in collecting, assimilating, organizing and computerizing the voluminous documentation in existence would ultimately ensure that the hearings be conducted in an expeditious and efficient manner.

I then outlined in detail the work done during this 'start-up period,' which included the creation of two libraries, one for the Commission itself and one for parties with standing and other interested parties, containing the voluminous materials relating to the Guy Paul Morin proceedings, and the creation of a database accessible to all parties with Summation search capacity. The letter continued:

This start up period was also prolonged for reasons not anticipated by anyone when the original O.I.C. was approved. The Crown Law Office and the Court of Appeal were requested by the Commission to collect, organize and deliver much of the documentation now contained in our libraries. This, understandably, took several months. Commission Counsel and the Metropolitan Toronto Police agreed that a protocol had to be established before sensitive (and voluminous) materials in the possession of the police could be released. This ensured that appropriate safeguards to protect legitimate privacy issues were in place, and that any ongoing police investigation would not be compromised, while ensuring that parties with standing would have the full ability to address relevant issues at the inquiry. This very necessary protocol had to be in place prior to obtaining these materials which were of great importance to us and to parties with standing. Finally, a variety of issues, such as standing, funding and publication bans had to be addressed before the public hearings on the substantive issues could commence.

One cannot be oblivious to the fact that criticism has been directed to some public inquiries, rightly or wrongly, for repeated extension requests, and undefined or uncontrolled hearings. A recent article in the *Globe and Mail* reflected such criticism. I could not help but note that our commission was listed as a notable exception.

As I earlier indicated, the public hearings began in February of this year (and will have lasted less than six months by June 30, 1997). This request is, therefore, as indicated above, more reflective of the considerable amount of time spent 'up front' gathering and consolidating materials, and designing the process so that the hearings, upon commencement, would proceed expeditiously and fairly. This latter goal appears to have been achieved to date. However, I am mindful of the concerns which any extension requests raises and the importance that the public support the work of this Commission. ... Accordingly, should the proposed timetable be acceptable to the government, I will not apply for a further extension.

Pursuant to this request, the Order in Council was amended to extend the life of the Commission to March 31, 1998, as requested. (See *Appendix A-2*.) Though the letter was written only two months into the public hearings, the hearings did proceed in accordance with the letter. The evidence was completed on December 18, 1997, the date specified in my request. My Report is hereby submitted on March 31, 1998, as scheduled. The completion of this Inquiry on schedule was accomplished through the efficient and effective advocacy of all counsel, extended sittings on occasion and some prioritization of issues.

My letter also reflected my hope that much of the evidence which would otherwise be relevant during the 'section 5 Phase' of the Inquiry, would be called by Commission counsel during the earlier Phases, through ongoing discussions between Commission counsel and counsel for parties who had received section 5 notices, and so it was. This enabled evidence relied upon by those parties to be presented in the context of the factual and systemic issues at this Inquiry, rather than in a Phase which exclusively must focus on alleged misconduct. This approach was most successful. Indeed, less than two days of section 5 evidence was heard. As a result, Commission counsel, in anticipation of a shortened section 5 Phase, were able to allocate

more time to earlier Phases.

K. Breadth of the Systemic Issues

At the commencement of each Phase, Commission counsel listed potential systemic issues which could arise from the evidence tendered during that Phase. At the end of Phase V (the trial), Commission counsel circulated a refined list of 57 systemic issues which they had identified during the Inquiry. This list was intended to facilitate the presentation of evidence during the systemic Phase which was to follow and, ultimately, the closing submissions of counsel directed to any recommendations for change. Other counsel were invited to comment on this list of systemic issues. It appeared there was general consensus that this list accurately identified the systemic issues arising out of the Inquiry evidence.¹⁶ This list follows:

(i) Phase I Systemic Issues

Phase one raises systemic issues relating to jailhouse informants and their use in criminal proceedings:

1. What reliability concerns are raised generally in connection with jailhouse informants? (This issue might involve consideration of the documented techniques used by jailhouse informants in various jurisdictions to mislead the authorities.)
2. To what extent have unreliable jailhouse informants contributed to miscarriages of justice or potential miscarriages of justice, particularly in other jurisdictions? What, if any, lessons can be learned from such experiences?
3. When, and to what extent, should their evidence be used by

¹⁶ By letter dated November 6, 1997, the Ontario Crown Attorneys' Association requested that the allocation of resources to the prosecution of criminal cases in Ontario be considered during the systemic Phase. It was the Association's position that even though lack of resources did not affect the Morin prosecution, many systemic issues have resource implications. Recommendations must be responsive to fiscal realities. I agreed with this position and permitted limited questioning directed to this issue.

the prosecution in a criminal case? How, if at all, can the potential dangers associated with their evidence be reduced?

4. What, if any, protocols, rules or guidelines should govern the relationship between jailhouse informants and the police?
5. What, if any, protocols, rules or guidelines should govern the relationship between jailhouse informants and Crown counsel?

A number of the following questions are more particular forms of questions 4 and 5:

6. To what extent should (or must) police and/or Crown counsel evaluate the reliability of jailhouse informants as a precondition to their use or potential use as witnesses? How can the authorities best evaluate reliability?
7. What, if any, benefits should be offered informants as inducements to give evidence? Who should negotiate these benefits on behalf of the prosecution?
8. How should these benefits (or potential benefits) be recorded? When and how should these benefits (or potential benefits) be disclosed?
9. What, if any, protocols, rules or guidelines should govern benefits sought or conferred after testimony has been given?
10. To what extent, if any, should trial judges be empowered to exclude unreliable evidence? If jailhouse informant evidence is tendered, what instructions should be given to the jury?
11. The discussion paper [prepared by Mr. Sherrin at the direction of the Commission]¹⁷ makes reference to the various

¹⁷ A discussion paper dated December 6, 1996, by Chris Sherrin was circulated to all counsel (*Jailhouse Informants in the Canadian Criminal Justice System, Part I: Problems with their Use* (1997), 40 C.L.Q. 106; *Jailhouse Informants, Part II: Options for Reform*

recommendations arising out of the Los Angeles grand jury on jailhouse informants. Should all or some of these recommendations be adopted here?

12. To what extent, if any, should institutional records of jailhouse informants be made available to the Crown and defence? What procedural rules or protocols should govern access to such records? To what extent (and how) should prior cases in which an informant has been involved be recorded and disclosed?

(ii) Phase II Systemic Issues

Phase II raises systemic issues relating to the formation of forensic findings and opinions, the treatment of forensic issues in the criminal courts and the relationship between forensic scientists and the other participants in the administration of criminal justice:

13. To what extent has forensic evidence contributed to miscarriages of justice or potential miscarriages of justice, particularly in other jurisdictions? What, if any, lessons can be learned from such experiences?
14. What, if any, involvement should the forensic scientists have in the collection of evidence (or decisions as to which evidence to collect) at the body site or other locations?
15. To what extent do police receive adequate direction and training on how to collect forensic evidence, or what forensic

(1997), 40 C.L.Q. 157.) It addressed the problems associated with the use of jailhouse informants and various options reflected in the literature for reform. The discussion paper, citing the work of Evan Haglund (*Impeaching the Underworld Informant* (1990), 63 S. Cal. L. Rev. 1407 at 1408-1409), defines a jailhouse informant as "an inmate, usually awaiting trial or sentencing, who claims to have heard another prisoner make an admission about his case." Commission counsel expressed the view that the use of undercover police officers or confidential informers (whose identities remain undisclosed) raise different systemic issues, beyond the scope of this Inquiry. Counsel were also invited to provide input on the appropriate definition of a jailhouse informant, for the purposes of any systemic recommendations.

evidence should be collected? To what extent do the police (and identification labs) have adequate resources to perform their forensic-related role?

16. What protocols, rules or guidelines should govern the relationship between the Centre of Forensic Sciences (or forensic scientists unaffiliated with the Centre) and the police?
17. More specifically, to what extent should the collection or examination of forensic evidence be driven by an investigative theory? Put another way, what should the relationship be between the forensic tests requested or performed, and the investigative theory?
18. How can the independence and objectivity of the Centre of Forensic Sciences be ensured and fostered? What, if any, protocols, rules or guidelines should exist to promote such independence and objectivity? How, if at all, should the relationship between the Centre and defence counsel be altered to promote such independence and objectivity?
19. A breakdown in communication between forensic scientists and the police has been raised as an issue here. What protocols, rules or guidelines can promote the accurate and complete transmittal of findings, and the limitations upon those findings, by forensic scientists to the police, who act upon those findings? When should reports be prepared, how should they be formatted and what should they contain?
20. A breakdown in communication between forensic scientists and Crown counsel has been raised as an issue here. What protocols, rules or guidelines can promote the accurate and complete transmittal of findings, and the limitations upon those findings, by forensic scientists to Crown counsel?
21. An issue has been raised here as to how well forensic scientists, the police, defence and Crown counsel communicate forensic findings, and the limitations upon

them, to trial courts or at pre-trial proceedings? What, if any, systemic changes can better ensure that these findings, and the limitations upon them, are conveyed to the court in a scientifically valid, understandable and accurate way?

22. To what extent should the language of forensic scientists be standardized? For example, does the sometimes interchangeable use of phrases such as 'consistent with', 'may originate from', 'are similar to' and 'are a match' enhance or detract from the appropriate use of forensic evidence? Does the use of some language mislead the trier of fact, and further suggest standardization of language?
23. How adequate are the expertise, training and resources of the Centre to deal with hair and fibre evidence in particular? What protocols, rules or guidelines should govern the internal/external review of a forensic scientist's work, to ensure accuracy, objectivity and appropriate recognition of the limitations upon any findings?
24. How should Centre employees be designated by the Centre to act as experts in serious criminal cases?
25. What information about a criminal case should be communicated to the forensic scientists by the police? What protocols, rules or guidelines should regulate this communication?
26. What protocols, rules or guidelines should regulate the collection, transmittal, documentation, preservation (in a non-contaminated environment) of trace evidence?
27. What protocols, rules or guidelines should govern requests by the defence for DNA testing?
28. Issues have been raised on the public record as to the adequacy of the autopsy initially performed in this case and the findings resulting therefrom. What, if any, systemic changes should be made to address pathology-related issues?

29. The necklace hair in the Guy Paul Morin case was said to be 'similar' to Guy Paul Morin's known hairs, such that he could not be eliminated as the donor. It was also said that the comparison had extremely limited probative value. Should such evidence be admissible at the instance of the prosecution or be used generally for investigative purposes only? Put another way, what should the threshold of admissibility be for such evidence? Should there be protocols governing when hair and fibre opinions can be expressed (such as those that govern fingerprints)?
30. Disclosure of internal documentation at the Centre has been raised as an issue here. What materials from the Centre should be subject to disclosure and what protocols, rules or guidelines, if any, could enhance the disclosure process?
31. How can the loss of evidence be prevented? What evidence should be preserved and for how long? What, if any implications, should flow from the loss of evidence?

(iii) Phases III and IV Systemic Issues

Phase III raises systemic issues relating to the conduct of an investigation from the disappearance of a young child to the discovery of bodily remains. Phase IV raises systemic issues relating to the conduct of an investigation from the discovery of bodily remains through to the identification of a suspect, arrest and prosecution:

32. When should a missing person investigation be considered and treated as a potential abduction or a homicide?
33. How should the initial search and investigation be structured so as to maximize its effectiveness, the use of resources, and the preservation of potential evidence? More specifically, when and how should a door-to-door canvass be done? What system should be in place to ensure that an officer in charge is aware of all occurrences, investigations and follow-ups? How should investigators clear potential suspects? How can files be most effectively transferred from one jurisdiction to

another? How can the relationship between different police forces be enhanced? (Counsel should be mindful of Mr. Justice Campbell's recommendations in this regard.)

34. What protocols, rules or guidelines should regulate the treatment of the body site and the collection, preservation and transmittal of physical evidence for forensic examination or for use in court.
35. How should a homicide investigation be structured to maximize its effectiveness, the use of resources and an accurate resolution? More specifically, how should officers be assigned and to what tasks? What investigative plan should motivate the investigation? How should teams of investigators report and to whom? To what extent should investigative teams be privy to the work of others?
36. What reliance should be placed upon polygraph results and profiling in setting the investigative priorities and direction to be taken by the investigation?
37. How is the reliability or accuracy of evidence enhanced or reduced by certain investigative practices? How, if at all, can investigative practices be improved to enhance accuracy and reliability? What protocols, rules or guidelines should regulate the conduct of interviews by police?
38. More specifically, how should police interviews be recorded? What protocols, rules or guidelines should govern the recording of such statements? What, if any, implications should flow from unrecorded interviews?
39. How, if at all, should evidence be assessed by investigators for relevance and reliability, and to what extent is that assessment coloured by the investigative theory? Similarly, how should potentially exculpatory evidence be dealt with by investigators, once a suspect has been identified or an arrest made? Is 'tunnel vision' a systemic problem and, if so, how can it be addressed?

40. How should 'late breaking evidence' be dealt with?
41. How should the documentation associated with the investigative process (supplementary reports, notebooks, etc.) be organized? When should information be contained in supplementary reports as opposed to notebooks and should such matters be standardized? What additional or different protocols, rules or guidelines should regulate police notebooks, supplementary reports and other documentation?
42. To what extent have poor or inappropriate investigative practices contributed to miscarriages of justice or potential miscarriages of justice, particularly in other jurisdictions? What, if any, lessons can be learned from such experiences?
43. Generally, how can the investigative process be improved to promote the accurate identification of the perpetrator?
44. How adequate is police training? How, if at all, can training of investigators be improved?

(iv) Phase V and General Systemic Issues

Phase V raised issues relating to the exercise of prosecutorial discretion, disclosure and the conduct of criminal cases generally. It involved consideration of the roles of all participants in the administration of criminal justice:

45. Can some or all of the causes of wrongful convictions in Canada or elsewhere be systemically identified? If so, what, if any, lessons can be learned from these systemic causes?
46. To what extent should individual items of evidence be assessed by Crown counsel for reliability and accuracy, as a precondition to their introduction by the prosecution? What, if any, test should be applied by Crown counsel to that assessment (*e.g.* evidence known to be false or inaccurate, suspected to be false or inaccurate, likely false or inaccurate etc.)? To what extent might such an assessment be coloured

by the position/theory of the Crown and how might that affect how or by whom such an assessment should be made? Is 'tunnel vision' a systemic problem? If so, how should it be addressed?

47. What protocols, rules or guidelines should govern the conduct of Crown interviews with prospective witnesses? How should such interviews be recorded? (See Phase IV, questions 6 and 7, which reflect, in more detail, analogous questions, though the answers may be very different in the context of Crown interviews.)
48. Should the jurisdiction of the trial court or appellate court be expanded to permit wider judicial review of the jury's verdict? Should the jurisdiction of the appellate court be narrowed to limit appeals against acquittal?
49. Should exculpatory statements made by an accused on arrest be admissible at the instance of the defence? If so, under what circumstances?
50. Should reciprocal disclosure be mandated for expert evidence?
51. An issue was raised at the Inquiry as to what appellate Crown counsel do when the guilty verdict is not unreasonable in law but nonetheless disquieting. What, if any, changes should be made to the role of appellate Crown counsel to address this issue?
52. Within the framework of the present adversarial system, what, if any, trial procedures should be altered to enhance the fact-finding process and reduce the risk of wrongful convictions? For example, to what extent should trial judges deal with the evidence in their closing instructions or comment upon the evidence?
53. Should the law on consciousness of guilt or 'after the fact' evidence be altered?

54. Should the threshold of admissibility for individual pieces of circumstantial evidence be altered? (This question is also specifically addressed in Phase II, question 17.)
55. What, if any, systemic problems arise from the relationship between Crown counsel and the police? How might these problems be addressed? Does this relationship limit the ability of Crown counsel to deal with unreliable police evidence prior to, during or after the criminal trial?
56. How, if at all, should the education of Crown and defence counsel be improved to enhance the criminal trial process and prevent miscarriages of justice?
57. Subject to privilege and statutory exceptions (such as for confidential medical records), should there be an 'open box' disclosure policy in Ontario?

Many of these systemic issues have been addressed by me. Some deserve more extended and discrete attention. In formulating my recommendations for change, I have relied upon the evidence tendered at this Inquiry, particularly the systemic evidence, together with the considerable resource materials collected by my staff and made available to all counsel.

L. Evidentiary Rulings: Limitations on the Evidence Tendered

In the course of the Inquiry I made certain evidentiary rulings which sometimes limited the evidence to be heard. Some of these rulings reflected, in part, priorities given to issues of greater importance to ensure the timely completion of the Inquiry. The more significant of these rulings are highlighted below.¹⁸

¹⁸ One ruling, wherein I declined to compel Michael Michalowsky to testify, is addressed in a later chapter.

(i) Evidence Tendered Only at the First Trial

There is no doubt that a number of issues do arise out of Mr. Morin's first trial. Further, there is no doubt that the Order in Council, by its express terms, extends my mandate to the first trial. That being said, Guy Paul Morin's first trial resulted in his acquittal. (This acquittal was later reversed on appeal and a new trial ordered.) It was only at Guy Paul Morin's second trial that he was convicted. Because the essence of the mandate was to examine how and why the administration of justice failed Guy Paul Morin and the public, I chose, by and large, to direct the focus of the Inquiry to issues relevant to Guy Paul Morin's wrongful arrest and conviction. This necessarily meant that far less attention was directed to Mr. Morin's first trial.

During the Inquiry, counsel for the Ontario Crown Attorneys' Association wrote to Commission counsel requesting that our Commission investigate the propriety of a defence lawyer raising a defence relating to the state of mind of the accused (such as insanity) absent proper instructions from the client, and the manner in which psychiatric assessments are conducted and utilized in a criminal case. This request was related to the fact that Clayton Ruby, counsel for Mr. Morin at the first trial, submitted to the jury that Mr. Morin had not committed the offence charged but, should the jury find otherwise, he was not guilty by reason of insanity. Psychiatric and psychological evidence was tendered by the defence in support of this alternative defence.¹⁹

In my view, Crown counsel who prosecuted Guy Paul Morin at his second trial, as well as police officers who investigated Guy Paul Morin, were fully entitled to tender evidence before me as to how, if at all, their state of mind was affected by the insanity defence offered at the first trial and by the psychiatric and psychological assessments relating to that defence. These matters, if known to them, may have affected or may explain their conduct and become relevant on that basis. Accordingly, I permitted such questions to be directed to prosecutors and investigators; indeed, I heard considerable evidence as to their state of mind arising from the insanity defence. Sometimes, my own counsel led that evidence.

¹⁹ By letter dated May 23, 1997, Mr. Levy, counsel for Mr. McGuigan and Mr. Smith, supported the Ontario Crown Attorneys' Association position.

That being said, the defence of insanity was not raised at the second trial. No psychiatric or psychological assessments of Guy Paul Morin were tendered at the second trial. Put succinctly, such evidence played no part whatsoever in Mr. Morin's second trial. Accordingly, the propriety of counsel raising an insanity defence or the manner in which psychiatric or psychological assessments are conducted and utilized were issues of marginal relevance to this Inquiry. Further, these issues are of limited systemic interest. When the first trial was held, Mr. Morin was compelled to introduce the alternative insanity defence during the trial proper. (Indeed, Mr. Ruby unsuccessfully applied for leave to reserve any alternative insanity defence until after the jury first determined whether Mr. Morin committed the crime.) Now, such a bifurcated approach is statutorily mandated. In summary, the propriety of an insanity defence tendered on behalf of an accused who denies any involvement in the crime no longer arises and, further, was an issue confined to the trial at which Guy Paul Morin was acquitted. To the extent to which the insanity defence was relevant to state of mind, I admitted it.

I note that counsel for the Ontario Crown Attorneys' Association subsequently deferred to Commission counsel's position on this issue and withdrew his request that the issues he raised be investigated.²⁰

The issue was revisited later in the Inquiry when Robert Armstrong, counsel for Mr. Scott, sought to question Mr. Scott relating to the defence of insanity advanced at the first trial. My oral ruling given on October 22, 1997 was, in part, as follows:

Objection has been taken by Commission counsel to a series of questions which Mr. Armstrong wishes to direct to Mr. Scott relating to the defence of insanity advanced at the first trial. A number of counsel have made submissions directed not only to the specific questions sought to be asked by Mr. Armstrong, but to the scope of the inquiry generally. I therefore wish to make some general remarks in addition to my ruling on the specific questions raised.

I then reread my mandate, as reflected in the Order in Council, and continued:

²⁰ Letter from S. Skurka dated June 17, 1997.

It follows that my mandate is not confined exclusively or chronologically to the events at the second trial. In fact, it encompasses among other matters the inquiry into the investigation by the York Regional Police force into the disappearance of Christine Jessop on October 3, 1984, the events surrounding the finding of her body on December 31, 1984, and the subsequent investigation by the Durham Regional Police, including the investigation of Mr. Morin and his arrest on April 22, 1985. It might be alleged that some or all of these areas of inquiry may have had an impact on the wrongful conviction of Mr. Morin at the second trial.

That being said, I believe some limitations must be placed on the *viva voce* evidence heard at this Inquiry, but these limitations must be consistent with my undertaking, stated publicly on a number of occasions, to have a full, fair and open hearing yet, as I also said, one of limited duration. Towards this end, I recognize — to state, perhaps, the obvious — that Guy Paul Morin was acquitted at the first trial and only convicted at the second trial. So the second trial is, by this very fact, of greater importance to my mandate than the first trial.

Accordingly, Commission counsel have attempted to prioritize the items of importance at this inquiry and, in my view, have done so, fairly and without prejudice to the parties. It is not a matter of competing objectives — a timetable vs. thoroughness. It is, rather, an examination of what I will need to carry out the mandate, and if I felt for a moment that I [was] required to know more about the questions now raised I would not hesitate to make the necessary time.

With these principles in mind, Commission counsel indicated at an early opportunity that they would not lead evidence as to why the section 16 defence was called at the first trial, whether the evidence was accurate or inaccurate and whether that defence should have been called. However, the investigators and Crown counsel who became aware of that evidence, which is reflected on the public record, would be fully entitled to rely upon the effect that such evidence had on their state of mind and conduct. I agreed with that position then and I still do so now, and in fact we have already heard a good deal of evidence on that point.

Section 16 was not invoked at the second trial. It played no part in that jury's consideration. The systemic issues arising out of the section 16 defence are now less applicable since a bifurcated proceeding, which was sought by the defence at the first trial and refused, is now the law. On balance, I am, therefore, of the view that the limitations suggested by Commission counsel in the early stages of the inquiry on the receipt of certain evidence relating to the section 16 defence are appropriate.

With this in mind, I will permit Mr. Armstrong to explore with Mr. Scott how the section 16 defence, together with the evidence supporting that defence, affected his state of mind, and I add that I have carefully noted the evidence already in the record and to which I alluded before on how this evidence impacted on the state of mind of other parties at this hearing.

I will not, however, permit Mr. Armstrong or other counsel to explore the circumstances under which the defence was called, the propriety of calling such a defence, the instructions that may have related to that defence or to put other questions of a similar nature. In my view, this approach causes no unfairness to Mr. Scott or other parties, nor will it deprive the Commission of evidence which it should have in order to fulfill its mandate. Indeed, Mr. Armstrong portrayed these questions as relating to a systemic issue. Furthermore, this approach prevents potential unfairness to persons not represented here — a point made by Mr. Cooper when Mr. Lockyer cross-examined Mr. Gover as to the latter's view of the evidence.

During this argument, it was also suggested, by analogy, that Mr. Scott should not be questioned on any disclosure issues which arose at the first trial. It was also suggested that it was potentially unfair to explore Crown conduct and not the conduct of the defence. Though these points are further addressed by me below, I did refer to them during my oral ruling on October 22, 1997, in the following terms:

It was suggested in argument that Mr. Scott should not have been questioned by Ms. Currie about matters

which arose at or prior to the first trial. I do not agree. As set out above, the areas canvassed are within my mandate and are potentially relevant to additional issues now before me. For example, the questions relating to the laundromat test and to the Jessop will-says²¹ may well be relevant to the investigation of Guy Paul Morin at large and to the ultimate evidence that was given at the second trial. In this regard, I note the submissions made by Mr. Sandler on July 22, 1997, Vol. 75, p.24 and following and referred to yesterday in argument.

I think it important to note that Mr. Scott's evidence at the stay proceedings prior to the second trial is six volumes in length. He was questioned about dozens (if not hundreds) of items of alleged non-disclosure prior to the first trial. In my view, Commission counsel has appropriately confined her examination to but a few of those issues.

Finally, I wish to comment on the suggestion made that it is inappropriate to examine the conduct of Crown counsel and not defence counsel. In fact, the conduct of defence counsel at the second trial has been extensively explored. I have noted the many questions and answers directed to this issue, largely without objection. Defence counsel at the second trial have not been insulated by the scope of this inquiry. Commission counsel, counsel for Mr. McGuigan and Mr. Smith have elicited much of this evidence. The failure to examine the conduct of defence counsel at the first trial in calling a section 16 defence does not represent any general decision to focus only on Crown counsel, but rather the appropriate prioritization of issues earlier described.

The official record of this inquiry contains transcripts of all proceedings connected with the proceedings against Guy Paul Morin. It contains the evidence presented in connection with the section 16 defence. Counsel and police who were present heard it. Others have read it. We know what was said. Whether the

²¹ A 'will-say' is a summary of a witness' anticipated evidence, which may be provided to the defence as a form of disclosure.

witnesses were right or wrong in their opinions is not now in issue, and indeed I do not intend to take into consideration what Mr. Lockyer elicited on this point from Mr. Gover before Commission counsel's objection was made. To do otherwise would not be fair but, quite apart from that, whether the evidence was believed or disbelieved it was there for all to hear and, as I said before, we have already heard how that may have affected police and Crowns and others and I will, of course, bear that in mind.

A similar issue arose in connection with the evidence of Gordon Hobbs. Counsel for the Jessops²² and counsel for Guy Paul Morin requested that Officer Gordon Hobbs be called as a witness during the Inquiry. Officer Hobbs was a witness for the prosecution at the first trial only. He testified as to purportedly incriminating conversations which he had with Guy Paul Morin while posing as a fellow inmate at the Whitby Jail. Surreptitious recordings were made by police of such conversations. The recordings were of uneven quality. The prosecution and defence called conflicting evidence as to the precise content of these conversations, their meaning, and as to a purportedly incriminating gesture by Guy Paul Morin to Officer Hobbs (showing how he killed Christine Jessop) not captured on tape, which was denied by Mr. Morin. Commission counsel responded to this request as follows:

It is our present intention not to call Officer Hobbs as a witness at the Inquiry. The Commissioner's mandate is, in essence, to examine the wrongful conviction of Guy Paul Morin, its causes and the important systemic issues arising out of the wrongful conviction. Undoubtedly, any number of issues arise out of Mr. Morin's first trial, when he was acquitted. However, these issues do not fall within the Commissioner's mandate. Further, as you know, our time frame is a limited one. It is important that we fully and fairly investigate the important issues directly arising out of the wrongful conviction at Mr. Morin's second trial within that time frame. A direct examination of the contents of Officer Hobbs' evidence would involve consideration of his evidence, the taped recordings, tape enhancements already done or proposed to now be

²² In this instance, the application was brought by Robert Jessop alone.

done, and the various interpretations given at trial as to the contents of the taped conversations; this would seemingly involve a number of days of evidence. Having said this, the existence and contents of Officer Hobbs' evidence may be directly relevant to issues to be directly examined by the Commissioner. For example, Crown counsel at the second trial and police officers who investigated Guy Paul Morin must be permitted to tender evidence before the Commissioner as to how, if at all, their state of mind was affected by the existence and contents of Officer Hobbs' evidence. Things known to them which affected or explains their conduct become directly relevant to the Commissioner's mandate on that basis. Of course, Officer Hobbs' evidence is a matter of public record which is available to the Commissioner.

This request was renewed before me by counsel for Robert Jessop. Counsel for Mr. Morin, though expressing his desire to cross-examine Mr. Hobbs, reflected to me his understanding of the time constraints and why, in the circumstances, the Commission could not undertake to call Mr. Hobbs. On August 14, 1997, I adopted the position advanced by Commission counsel and did not order that Mr. Hobbs be called as a witness. I note that, pursuant to the position taken by Commission counsel and my ruling, evidence was elicited as to the state of mind of prosecutors and investigators, induced by Mr. Hobbs' evidence (whether his evidence was accurate or inaccurate). I have taken that evidence into consideration.

(ii) Disclosure Issues

Prior to the commencement of the jury portion of the second trial, the defence brought an application to stay the proceedings due to alleged misconduct on the part of the authorities. The misconduct largely related to alleged non-disclosure and misleading disclosure. In the alternative, the defence sought access to the complete investigative file relating to the case ('the open box application'). This application lasted seven months, and involved an exhaustive examination of what had been and what had not been disclosed previously. The applications ultimately failed, as did re-applications to the Supreme Court of Canada to reconsider its decision to affirm the setting aside of the acquittal at the first trial and the ordering of a new trial. Donnelly J., in dismissing the applications, found, in part, that

[t]he hinge pin of the application, the alleged massive suppression, did not occur. Neither was it massive, nor was it suppression. To "suppress" is "to keep secret, to refrain from disclosing or divulging" ... More precisely, this information was not disclosed. Any breach of duty demonstrated on these motions resulted generally from inadvertence or failure to consider the issue. I am unable to find any wilful failure to disclose on the part of the Crown.

Here, counsel for John Scott contended that this Inquiry should not consider any of the disclosure issues, essentially for three reasons: Donnelly J. had resolved these issues (including issues of credibility) in favour of the prosecution; the disclosure issues raise no systemic issues of interest since the Supreme Court of Canada's decision in *Stinchcombe*²³ has addressed these issues subsequently; and that, since disclosure had been provided prior to the second trial, these issues were unrelated to the wrongful conviction.

I do not accept that Donnelly J.'s rulings bind me or make it inappropriate to examine related issues at the Inquiry. My mandate directs me to examine, amongst other things, what went wrong at the second trial. As Commission counsel put it, "it would be strange if the Commissioner was prohibited from examining relevant issues because they were ruled upon at the trial which resulted in the wrongful conviction." Further, I heard evidence which was unavailable to Donnelly J.

I do accept that the intervention of the *Stinchcombe* decision reduces the systemic interest in the disclosure issues pursued in the Guy Paul Morin case. I further accept that the disclosure issues often bore more relevance to the first trial. As I have previously indicated, though my mandate permits me to examine, *inter alia*, the entire Guy Paul Morin criminal proceedings, which include the first trial, I recognized (as did my counsel) that issues directly relevant to Mr. Morin's wrongful arrest and ultimate conviction had greater priority. Accordingly, the vast majority of the disclosure issues raised on the pre-trial motions were not explored by Commission counsel. Commission counsel's position, with which I agreed, was expressed as follows:

²³ (1992), 68 C.C.C.(3d) 1 (S.C.C.)

[I]t must be clear that we have often refrained from examination of various witnesses on the vast majority of the disclosure issues related to the first trial. This reflects our view that the Commissioner's mandate is most directly related to the wrongful conviction of Guy Paul Morin and that, accordingly, issues which relate exclusively to the first trial may be less relevant to the mandate and therefore have less priority for the Inquiry.

Some disclosure issues which relate to the first trial also have relevance to issues arising out of the second trial or to the administration of criminal justice generally. The Jessop will-says, the 'scream' test, the OPP fingerprint evidence (and its relationship to Michalowsky's evidence), the 'laundromat' test and the cigarette butt evidence are examples of matters which, in our view, may have significant relevance beyond the first trial.

Commission counsel ensured that all other interested counsel were advised of those areas that would be explored by Commission counsel. Commission counsel also met with other counsel to narrow the disclosure-related issues that would be raised by other counsel.

(iii) The Jurors as Witnesses

Counsel for the Jessops, supported in part by counsel for Guy Paul Morin, moved that the jurors from both trials be summoned by me to give evidence at this Inquiry. On August 14, 1997, I dismissed the application for the following reasons (given orally):

Section 649 of the *Criminal Code*, subject to certain exceptions, prohibits jurors from disclosing "any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court."

Mr. Danson suggests that the wording of this section is such that jurors could, if they so wish, relate their personal views and impressions, so long as they do not disclose what was said in the course of their deliberations. And if that were impossible, he submits that the provision may well be unconstitutional because

it prohibits, *inter alia*, freedom of thought and of expression, and this to an extent that it could not be saved by the provisions in section 1 of the *Charter*.

It is not my intention, nor do I have the power, to rule on the constitutionality of section 649. It exists, and until such time as a court of competent jurisdiction may set it aside, it must be followed. And, indeed, a number of Canadian courts have, in the past, done so, as the cases submitted by Mr. Danson demonstrate.

I agree that in the present case it would not be the intention of counsel to try to use the jurors' testimony to impeach the verdict, which is one of the origins of the prohibition now found in section 649. Nevertheless, the line of demarcation is thin, and even if I were inclined, which I am not, to ask the jurors to appear, it would be an impossible task to monitor their evidence to the degree that all remarks which might be in violation of the Criminal Code would be excluded. As someone said yesterday — in jest, but only partly so — we might all become parties to the offence.

But I go further. While some of the jurors might be willing to testify, others may not, and if that were the case, the evidence might be skewed and of diminished value. And what if a juror were to make adverse remarks about an actor in the trial? Could he or she then be cross-examined by counsel and could he or she be asked, for instance, if others shared the view? Fairness would dictate that cross-examination be unfettered, yet section 649 would prevent this. This is but one example of the practical difficulties — difficulties which would be encountered even if I were to accept one of Mr. Lockyer's alternate proposals that the jurors be spoken to as a group and that the questions be predetermined, with no cross-examination allowed.

I have no doubt that the jurors' views might be enlightening and that their collective experience might make a fascinating chapter in the annals of criminal law. But while the terms of this Commission permit me to examine all aspects of Mr. Morin's wrongful conviction and to make such recommendations as I may see fit to improve the administration of criminal justice in this province — and, I might say, to do so by

March 31, 1998 — I must put limits on the process consistent with my mandate and fairness to all parties.

I realize that some jurors have given interviews which were widely reported. That was a matter for them to decide and I have no criticism of that fact. But to ask them to appear before this Commission, even voluntarily, raises both legal and practical hurdles which cannot be overcome.

Subsequently, counsel for the Jessops brought a motion before me “to state a case pursuant to section 6 of the *Public Inquiries Act*.” The application to state a case heavily focused upon the constitutional validity of section 649 of the *Criminal Code*, to which I extensively referred in my earlier ruling.

Section 6 of the *Public Inquiries Act* reads, in part, as follows:

6.-(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

It was, and is, my view that jurors ought not to be summoned, whether or not section 649 can withstand *Charter* scrutiny. Accordingly, I did not regard it to be an appropriate exercise of my discretion to state the proposed case. In written reasons dated September 24, 1997 (See *Appendix I*), I declined to do so. I stated, in part:

[E]ven without the presence of section 649, should it be declared unconstitutional, there are good reasons why I should not hear [the jurors'] testimony.

To begin with, section 649 was in place for both trials and both judges warned the jurors accordingly. [The relevant passages are reproduced in the written reasons]

This makes it clear that each juror was told *even before the deliberations began*, that what will be said in the

jury room cannot be disclosed thereafter, and for that reason alone I feel that any attempt to elicit these jurors' views and beliefs would be inappropriate. With these judicial admonitions, so firmly and unequivocally stated, it would be unseemly for me to summon the jurors to appear before this Commission under the pain of contempt. I realize, as Mr. Danson pointed out, that questions could be asked which would attempt to limit the response to generalities, but even if that were successful, would the right to cross-examine not be inhibited? And what if a juror, however inadvertently, were to make reference to what was said by a colleague? The list of difficulties goes on.

Furthermore, as I said in my previous ruling, while some of the jurors might be willing to testify, as some had indicated to the media, others might not, and evidence so obtained would necessarily be skewed and of diminished value.

I might add that I am fortified in this view by the recent pronouncement of Finlayson J.A. in *Regina v. Selles* (1997), 116 C.C.C. (3d) 435 at 452, and I quote from Mr. Justice Finlayson:

I would add that a jury's verdict has always been considered sacrosanct. A jury is protected from having to explain how its members voted and for what reason. The anonymity of the jury verdict safeguards the individual juror from personal scrutiny and accountability. Absent allegations of impropriety, a public investigation into the adjudicative process behind the collective verdict could well have an inhibiting effect on individual jurors who would otherwise be prepared to take unpopular positions with respect to the case before them.

In the result, for the reasons cited above, as well as those submitted by Commission counsel, I hold the firm view and conviction that, even if the constitutional challenge were to succeed — a question on which I clearly express no opinion — it is not necessary for me in order to fulfill my mandate that I summon the jurors, nor indeed would such a course be in the interest of justice. (Emphasis added.)

An application to the Divisional Court by counsel for the Jessops for an order directing me to state a case was unsuccessful. (See *Reasons, Appendix J.*) A further application for leave to appeal to the Court of Appeal for Ontario was also dismissed.

Counsel for the Jessops suggested in argument that I could not fulfill my mandate in identifying the causes of the miscarriage of justice unless I heard from the jurors at the second trial. This theme was reiterated by several witnesses at the Inquiry. In my view, this concern is unfounded. Appellate courts assess, on a daily basis, whether misdirection by the trial judge, the failure to admit admissible evidence or to exclude inadmissible evidence, or improper conduct by counsel did, or may well have contributed to an unsatisfactory jury verdict. On the totality of the evidence, I am able to say with certainty that certain evidence or conduct contributed to Guy Paul Morin's wrongful conviction: for example, the hair and fibre evidence tendered by the prosecution at the second trial undoubtedly contributed to the jury's verdict, though the evidence was seriously flawed and, in my view, worthless. In other respects, I am only able to say that evidence or conduct may well have contributed to the jury's verdict: for example, the evidence of Officer Robertson which, in my view, was equally worthless. An assessment of this evidence is no less important (either to an understanding of the Guy Paul Morin case or to the systemic issues) merely because I cannot definitively say that the jurors acted upon this evidence to Guy Paul Morin's detriment. Flawed evidence must and should be recognized and addressed by me in any event. I am of the view that the evidence tendered against Guy Paul Morin must, in some respects, be reviewed cumulatively and I return to this point later in this Report.

As I have previously stated, the jurors' collective experience would have undoubtedly been fascinating. However, their views may or may not have been terribly enlightening on the issues which I must address. They did not have the benefit of considerable evidence from investigators, prosecutors, civilian witnesses and experts which I have heard. It would be exceedingly difficult for them to reconstruct with precision what evidence each did or did not rely upon in forming his or her opinions — particularly when possibly coloured now by Guy Paul Morin's proven innocence and the revelations publicly reported during this Inquiry about some of the evidence they heard. Indeed, several counsel brought to my attention that media reports reflected inconsistent accounts from those jurors who did speak publicly as to what

evidence was or was not relied upon.

(iv) The Role of the Defence at the Second Trial

I wish to address this topic now, since some hold the misperception that I (or my counsel) immunized defence counsel at the second trial from any scrutiny.

It is my view that no participant at the second trial (prosecutor, investigator, defence counsel, Crown or defence witness) is entitled to avoid scrutiny at this Inquiry. Mr. Pinkofsky, lead defence counsel at the second trial, is no exception. Early in the Inquiry, Mr. Levy, counsel for Messrs. McGuigan and Smith, made his position clear that Mr. Pinkofsky contributed to the miscarriage of justice primarily by the ill-advised, sometimes hostile, approach taken to witnesses and the undue prolongation of the trial, resulting in jury alienation. During Phase I of the Inquiry, Mr. Levy also made his position clear that Mr. Pinkofsky's manner of examination of early Crown witnesses explains, in part, the prosecutorial decision to make an offer to the two jailhouse informants, permitting them to choose whether or not to testify as to Guy Paul Morin's confession. This dual position was reflected in the evidence of Mr. Levy's clients, Messrs. McGuigan and Smith, and advanced through the examination of numerous other witnesses, frequently by Mr. Levy and sometimes by Commission counsel, in fulfillment of their (and my) mandate. Some of this evidence extended beyond Mr. Pinkofsky's conduct at the second trial to his reputation amongst Crown counsel (which was relevant to how the prosecutors prepared to respond to him at trial). This evidence was relevant to the issues at this Inquiry and therefore admitted, and I deal with it in some detail in Chapter V.

Mr. Pinkofsky did not apply for standing at the Inquiry. He did not request that he be called as a witness. No other counsel sought to have Mr. Pinkofsky called as a witness at the Inquiry, despite inquiries by Commission counsel, but instead relied upon the evidence otherwise elicited. I did not feel it necessary to hear *viva voce* from Mr. Pinkofsky, since what he said and did at the trial was fully contained in the trial transcripts, which were available to me, and which my mandate permits me to consider.

Having said that, it was not surprising that significantly greater attention was directed to the conduct of police and prosecutors than to

defence counsel. The defence did not investigate, charge or lead the evidence relied upon to support the conviction of Guy Paul Morin. Unlike, for example, the defence counsel at *Donald Marshall's* trial, Mr. Pinkofsky relentlessly pursued issues of disclosure and investigative leads. Some Crown counsel regard Mr. Pinkofsky's approach to involve a wholesale attack on virtually every witness, particularly police witnesses, who testify for the Crown, without appropriate distinction. However well or ill-founded this criticism might be in other cases, there is no doubt that a disquieting number of witnesses for the prosecution in this case gave evidence which could justifiably be regarded as suspect.

(v) The Role of the Trial Judge

It was suggested during the Inquiry that I should determine whether the trial judge, Mr. Justice Donnelly, engaged in misconduct. Indeed, I was invited to 'censure' the judge. I declined the invitation, and I did so for the very good reason that I have no jurisdiction to consider any alleged misconduct by a judge of the Ontario Court of Justice (General Division). However, I am not unmindful of the fact that the trial judge was an important and active participant in Mr. Morin's second trial, and his actions during the lengthy proceedings, like those of the other participants, may have played a role in Mr. Morin's wrongful conviction. My mandate, therefore, permits me to examine the trial judge's rulings and actions, not with a view of finding misconduct, but rather in assessing what went wrong and how this might be rectified in future.

A number of allegations were advanced by Mr. Morin's counsel in his Notice of Appeal against his client's conviction. This Notice sets out 22 grounds of appeal,²⁴ 18 of which allege errors on the part of the judge. Some of these allegations were repeated before the Commission. As Catzman J.A. pointed out in his decision to grant bail pending the hearing of the appeal, the appeal was not "frivolous," and seven grounds (which were discussed by counsel during the bail application) were found by His Lordship to be "clearly arguable." However, the judgment of the Court of Appeal, acquitting Mr. Morin, was based on one ground only: the fresh evidence of DNA results

²⁴ An amended Notice of Appeal, outlining 181 grounds of appeal, was subsequently filed on March 11, 1994.

which exonerated Mr. Morin. The other grounds of appeal, therefore, were moot and were not dealt with by the Court.

This poses a dilemma: first, to state the obvious, I am not the Court of Appeal; second, I did not have the benefit of argument by the Appellant and the Respondent, as the Court would have had, had the appeal proceeded on the other grounds. Accordingly, I had no desire to convert this Inquiry into an appellate proceeding, and examine the many grounds of appeal which were raised in the Court of Appeal but left unresolved. Constraints of time and of resources also did not permit me to do so. Yet, as I said before, to carry out my mandate, I was obliged to consider all the circumstances of the case.

I resolved this dilemma by focusing on a limited number of issues which are of particular systemic interest or of particular relevance to understand the case itself. I have not otherwise attempted to evaluate the merits of the many issues which were raised in the Court of Appeal.

M. The Background Facts

(i) Overview

At the commencement of the public hearings, Commission counsel outlined the background facts relevant to the investigation into Christine Jessop's disappearance and murder and to the arrest and prosecution of Guy Paul Morin. At the commencement of each Phase of the Inquiry, Commission counsel further outlined the background facts relevant to that Phase. The following represents an overview of the relevant background facts, drawn in part, from the uncontentious facts that were known prior to the commencement of this Inquiry. Many of these facts are revisited (and expanded upon) in later parts of this Report.

(ii) Christine Jessop

It is appropriate to commence by reflecting upon the life of Christine Jessop. Counsel for the Jessops led this evidence from Janet Jessop:

Q. Now Janet, at this Inquiry we've heard many

details of Christine's death and the subsequent murder investigation, but we haven't heard anything about Christine's life. And I know that this is something that you've been wanting to tell at the Inquiry, and hopefully this will be your last time here. And I thought that this is your opportunity to tell the Inquiry at little bit about Christine herself.

A. Okay. She was a normal nine-year-old little girl. She was all of forty pounds soaking wet — excuse me. She really loved life. She loved her family, her uncles, her aunts and her cousins. She was a happy, sensitive, lively, caring and a little clean-freak girl. She had a terrific sense of humour. She was fun, she was feisty, and she loved to help in whatever you were doing, she just wanted to be with you.

And she was a little going concern and a very loving child. She loved school and she loved sports, particularly baseball. And she adored animals and particularly her own dog, Freckles. And she was the little type, she could go from a real lady to a little tomboy. She'd put the worms on the hook for her brother because he couldn't put them on. And she even slept with the baby chicks so that they wouldn't be alone at night.

And she was a very responsible little girl, she never wandered off from me for a minute. If she went to someone's home to play, or went to her grandparents for the weekend, she'd be phoning every five minutes just to say, hi. So that's the type of little girl that I lost due to some very, very foolish person, and very demented.

Q. And as Christine's mother, what kind of things did you and Christine do together?

A. Oh, we did a lot, we did everything together. We'd go to showers, shop, she and I were very, very close, and I guess maybe being the mother and daughter, you're closer to the daughter, the mother. We went to birthday parties, we went to parks, really the only time Christine was alone was when she was at school.

Q. And what were your expectations and dreams for Christine?

A. Well I think the first and most important thing was to remain the best of friends, which we were. And to see her graduate from school, to see her get married and have children and to remain a loving family and to let her pursue, rather, and achieve any goal in which she wanted to do, and this has all been taken away.

(iii) The Town of Queensville — The Jessops and the Morins

Queensville, Ontario, is a small town, about 35 miles north of Toronto, in the township of East Gwillimbury in York Region. Guy Paul Morin was 25 years old when he was arrested on April 22, 1985, and charged with the first degree murder of Christine Jessop. He has never otherwise been charged with any criminal offence. His family, consisting of his mother Ida, his father Alphonse, four sisters and one brother, moved to Queensville in 1978. At the time of Christine Jessop's disappearance, only Guy Paul Morin was still living with his mother and father. Alphonse Morin was an engineer, having retired from his teaching position at Seneca College in 1982. Ida Morin was a retired teacher who continued to supply teach with the North York Board of Education. Guy Paul Morin's sister, Yvette, her husband Frank Devine and their child, Andrew, who was then one and half years of age, will also be referred to in this Report.

Guy Paul Morin completed grade 12 and then attended various courses in auto upholstery, spray painting, air conditioning, and refrigeration and gas fitting. In July 1984, he commenced employment with a firm known as Interiors International Limited, which will be referred to as IIL. They were furniture manufacturers. He worked as a finishing sander and was employed there in October 1984 when Christine Jessop disappeared.

The firm of IIL is located in the area of Steeles Avenue and Weston Road, just north of the city of Toronto. In December 1984 Guy Paul Morin left his employment there to help his father with the renovation work being done to their residence in Queensville. Guy Paul was also a beekeeper and a musician. In 1984 he had beehives in his backyard and in Minden, about an hour and a half north of his home. He began playing the saxophone and clarinet in junior high school and has played in various community bands and won a number of awards and competitions.

As is reflected above, Christine Jessop was nine years old when she

disappeared on October 3, 1984. She was four feet nine inches tall and she weighed only 40 pounds. She attended Queensville Public School and was in grade four. She lived with her parents, Robert and Janet Jessop and her brother, Ken Jessop, in Queensville. In October 1984, Robert Jessop was serving a custodial sentence in Toronto for a white collar offence. He was released on compassionate grounds shortly after his daughter's disappearance. In October 1984, Ken Jessop was 14 years old.

The Morins and the Jessops were neighbours. Their homes were on Leslie Street, about an eighth of a mile north of the Queensville Sideroad. The Morin home was on an adjacent property, north and east of the Jessop property. To the northwest of both properties was the Queensville cemetery. There was neighbourly contact between the Jessops and the Morins. The extent of this contact was a contentious issue at trial. It was relevant to the significance, if any, to be given to fibre comparisons relied upon by the prosecution at trial.

(iv) The Disappearance of Christine Jessop

What precisely Christine Jessop was wearing on the day she disappeared was the subject of several different accounts in the course of the evidence called at two trials. In ruling on the motion to have the proceedings against Guy Paul Morin stayed at the outset of the second trial, Mr. Justice Donnelly outlined more than 20 different descriptions and reports of Christine's clothing. Apparently, Christine would often wear several layers of clothing to keep warm. On the day of her disappearance, she was variously reported to have been wearing a T-shirt, a blue hand-knit sweater, a light blue jacket with an attached hood and a pouch pocket on the front, bright blue corduroy slacks and blue-grey running shoes. She may also have been wearing a pink hooded jacket. Ken Jessop recalled that his sister was wearing a pink jacket when she left for school on the morning of her disappearance. Several persons who saw Christine on the afternoon of her disappearance indicated that she was wearing a light blue jacket with a hood tied under her chin and possibly something red.

On the morning of October 3, 1984, Christine Jessop boarded the school bus for the 1.2 kilometre drive to Queensville Public School. During the school day, her teacher distributed recorders to the students which they all took home that day. When she was returned to her home at the end of that

day, the school bus dropped her off at the end of her driveway at about 3:50 p.m. No one was home.

Christine Jessop and Leslie Ann Chipman, a school mate, had arranged to meet at the park after school that day, and Miss Chipman did go to the park at about 4:00 p.m., but Christine Jessop never arrived. Phone calls which Miss Chipman made to the Jessop home shortly after that went unanswered. The transcripts of the evidence reveal that Christine went from her home to the variety store at the south-east corner of Leslie Street and the Queensville Sideroad, .07 kilometres from the Jessop home. Chris Liasopoulos, its owner, testified that she came in alone between 3:30 and 4:00 in the afternoon, bought bubble gum and left a minute or so later. Various other witnesses gave evidence as to seeing Christine Jessop that afternoon.

One witness the defence relied upon was Sandra Horwood, who said that she saw a man driving a dark green or blue car in the area at about 4:05 p.m. and he appeared to force a small girl down towards his chest area with his right hand. There were other sightings.

On October 3, 1984, Janet and Ken Jessop had visited Robert Jessop at the Toronto East Detention Centre where he was then incarcerated. They were there early that day. From the detention centre they drove to various locations before proceeding to the dental offices of Dr. Paul Taylor in Newmarket. Ken Jessop was booked for a 3:30 appointment that day. Janet Jessop dropped Ken off at Dr. Taylor's office, ran some errands, returned to pick up her son and then they drove home to Queensville. Their early accounts to the police reflected that they had arrived home at 4:10 p.m. Janet Jessop ultimately testified that they arrived home between 4:30 and 4:35 p.m. Their arrival time and the circumstances which brought about their estimate of their time of arrival were the subject of considerable evidence on the pre-trial motion before the second trial, and at the trial itself. Of course, the times that Ken and Janet Jessop arrived home were relevant to Guy Paul Morin's alleged opportunity to commit the murder.

When Janet and Ken Jessop arrived home, Christine's school bag was on the pantry counter and the mail and newspapers had been brought inside the house. Her bicycle was lying on its side in the shed, its kickstand and carrier damaged. Christine's pink jacket may have been hanging on a hook

that was beyond her reach. At 4:49 p.m. that day, Janet Jessop telephoned her husband's lawyer in Toronto (on an unrelated matter) and she then drove to the park to look for Christine. She telephoned some of Christine's friends, looked in the cemetery and stopped at the variety store. Sometime between 7:00 and 8:00 p.m. that evening Janet Jessop telephoned the police.

(v) Guy Paul Morin's Activities on October 3, 1984

On October 3, 1984, Guy Paul Morin was at his place of employment at IIL. His time card confirmed that he left work that day at 3:32 p.m. He testified that he drove the family Honda north in the direction of his home. He stopped at the Upper Canada Mall in Newmarket on the way and purchased a lottery ticket from Susan Scott at the Infoplace Ticket Centre. He bought groceries at the Dominion Store. He may then have filled up his gas tank at a nearby gas station. He continued to shop at Loblaws and then at Mr. Grocers. He then drove north on Leslie Street, arriving home, he swore, between 5:00 and 5:30 p.m. As he walked towards his house, his brother-in-law was leaving. They spoke briefly. Guy Paul Morin's parents and his sister, Yvette, were at home. He carried the groceries into the kitchen and then, he said, he napped until approximately 6:30 p.m. He had supper with his parents after which he worked with his father outside the house into the evening, using trilighters as makeshift floodlights. At the second trial, the prosecution alleged that this alibi evidence was false and that the alibi put forward by Guy Paul Morin and his family had been concocted. (At the first trial, the prosecution contended that Guy Paul's family were mistaken in their support of his alibi.)

(vi) The Investigation by the York Regional Police

Queensville is within the jurisdiction of the York Regional Police. Accordingly, members of that police force responded to Christine Jessop's disappearance. Constable Rick McGowan was the first officer who arrived at the Jessop residence; he arrived at 7:53 that evening. Over the next seven hours, some 13 police cars, two emergency vehicles and 17 police officers had been dispatched to the Jessop residence. Constable McGowan testified that he attended the Morin residence that evening, and asked Ida Morin whether the Morins had seen Christine Jessop that day or noted anything unusual. According to McGowan, Guy Paul stared straight ahead, showing no apparent interest in the conversation. The Crown at the second trial relied

upon this evidence as evidence of guilt. On the other hand, the defence contended that the evidence was false and brought forward only after the first trial, and in any event, that the evidence was meaningless.

That evening, Alphonse Morin speculated that the police activity at the Jessop house was related to Ken Jessop. Guy Paul told his father that "I bet that little Christine is gone." He repeated this conversation to Detective Fitzpatrick and Inspector Shephard on February 22, 1985, and the Crown relied upon that evidence at trial as further evidence of guilt. The defence, on the other hand contended that the conversation between Guy Paul and his father reflected their speculation and evidenced nothing.

(vii) The Dog Search

There was evidence of a dog search on October 3, 1984. Alphonse Morin testified that some time around 10:30 in the evening, two police officers with a dog came to the Morin house. He authorized them to search the property and, according to the evidence of Guy Paul Morin, his father went outside to bring their dogs in while he stayed on the front porch talking to the officers. He told them he had not seen Christine Jessop that day and that he had not arrived home from work until 5:00 to 5:30 p.m. Constable David Robertson of the York Regional Police force testified at the second trial only. He indicated that he brought his dog, whose name was Ryder, to the scene sometime after midnight on October 3, 1984. He said he was given Christine Jessop's blue wool sweater to facilitate the search. Constable Robertson testified that he used the sweater to provide Ryder with a scent and that Ryder recognized the scent on Christine's bicycle. He testified that when he and the dog approached the Morin's beige coloured Honda, the dog began sniffing in a pronounced way and placed its front paws up against the glass on the passenger side of the vehicle. According to Constable Robertson, this signified the initial signs of a positive reaction, indicating that Ryder had detected Christine Jessop's scent. At this point, a dog, presumably one on the Morin property, barked; Robertson saw it at the side of the house. Although Alphonse, Guy Paul and Ida Morin all testified that no one let a dog out while the police were on the property with their dog, according to Constable Robertson, a dog had been let out of the Morin house while he was searching the Honda, and he therefore pulled Ryder away and backed towards the Jessop property.

At the second trial the Crown relied on the behaviour of the dog as evidence that Christine Jessop had ridden in the Morin Honda. The defence, on the other hand, seriously questioned Constable Robertson's qualifications as a dog scent expert and challenged both the accuracy and reliability of his evidence. The defence position was that it was wholly unbelievable.

(viii) The Failure to Search

Another issue arose out of the evidence that Guy Paul Morin failed to search for Christine Jessop. At both trials, the Crown suggested to Mr. Morin that he failed to search beyond his own backyard because he knew that Christine was dead and lying in a field in Durham Region and that a search in and around Queensville would be futile.

The defence, on the other hand, countered that the only meaningful inference to draw from Mr. Morin's failure to search for Christine Jessop while she was missing was that this was a sign of his innocence. The defence argued that if guilty, he surely would have made a show of joining the search parties.

(ix) Paddy Hester

At the second trial the Crown called the evidence of Paddy Hester, a Queensville resident, who testified that in the early morning of October 4, while participating in the search for Christine Jessop, she saw Alphonse and Guy Paul Morin. Guy Paul Morin was sitting in a truck between his father and his brother-in-law, Frank Devine. They were in a pickup truck on the shoulder of a road in Queensville. She swore that Guy Paul Morin was staring straight ahead. Both Guy Paul Morin and his father denied leaving their property that night and denied being in such a truck. The Crown at the second trial also relied on Paddy Hester's testimony that on October 6, 1984, three days after the disappearance of Christine Jessop, she went on to the Morin property and was looking into the Morin Honda when Guy Paul Morin suddenly appeared, yelled at her to get off his property, and chased her away. Mr. Morin agreed that on the weekend following Christine's disappearance he spoke with some person who was in the backyard looking inside his father's old Lincoln. He denied ever seeing Paddy Hester until she testified in Court. And he denied ever chasing anyone off the Morin property.

Although Paddy Hester claimed to have immediately reported both these incidents to the police, the first recorded statement given by Hester was on April 23, 1985 — which was a half year later — when she described coming across a man while searching near the cemetery on October 3, 1984. It was not until after the first trial that Paddy Hester gave statements to Detective Fitzpatrick and Inspector Shephard regarding the pickup truck incident on October 3rd and the later Honda incident on October 6th, involving Guy Paul Morin.

(x) The Finding of the Body of Christine Jessop

Various other searches for Christine were conducted in the area of Queensville in the days and in the weeks following her disappearance. The investigation by the York Regional Police continued through November and December 1984.

The body of Christine Jessop was discovered on December 31, 1984, by Fred Patterson, a local resident, and his two young daughters, who were walking near their property in Durham Region, about 56 kilometres east of the Jessop residence, and near the town of Sunderland. The main west to east thoroughfare in the area is a road known as the Ravenshoe Road. Christine Jessop's body was on its back and her legs were spread apart in an unnatural position, with her knees spread outward. She was wearing a beige turtleneck sweater, a blue pullover sweater, a blouse from which some buttons were missing and a pair of white socks with blue stripes. Subsequently, it was determined she was in fact wearing two pairs of socks. Her panties were found at her right foot. Blue corduroy pants with a belt and a pair of Nike running shoes were found just south of her feet. These clothes were subsequently identified as belonging to Christine. Her recorder with her name taped on it, which had been given to her at school on October 3, 1984, was found next to her body. The police were notified.

Up to 15 or 20 Durham officers were present at the search site. The body site was roped off, searched and photographed. Christine Jessop's remains were eventually placed on a board and transported to the coroner's office in Toronto. Because the body was discovered in Durham Region rather than in York Region, the investigation, which up to now had been handled by the York Regional Police, at this point was turned over to the Durham Regional Police Service. Two of the principal investigators in the case were

Detective Bernie Fitzpatrick and Inspector John Shephard. Inspector Robert Brown of the Durham Police took charge of the investigation upon his arrival. Sergeant Michael Michalowsky became the officer in charge of all identification aspects of the homicide.

On January 1, 1985, the remains were positively identified by dental records as those of Christine Jessop. An autopsy was performed on January 2, 1985, by Dr. John Hillsdon-Smith. Detectives Fitzpatrick and Nechay²⁵ were present at the autopsy along with Sergeant Michalowsky, who took possession of Christine's necklace with some hairs attached to it found at the body site. Dr. Hillsdon-Smith found the cause of death to be multiple stab wounds to the chest. Due to decomposition of the body, he was unable to say whether the deceased had been sexually assaulted. There were no animal teeth impressions on any bones he examined, however, the torn and missing flesh on the legs suggested animal activity. His findings were not inconsistent with death having occurred three to four months prior to January 1985.

(xi) The Funeral

Christine Jessop was buried on January 7, 1985, about a week after her body was discovered. At the second trial, two issues surrounding the funeral were put to the jury. The first was the issue of Guy Paul Morin's failure to attend the funeral. At the time of the funeral, Alphonse and Ida Morin were on holiday in Bermuda while Guy Paul was at home alone. He did not attend the funeral home or the funeral itself. He testified that he had expressed his condolences to Janet Jessop's father but not to Christine's parents.²⁶ When his parents returned from their vacation, they visited the Jessops to express their sympathy. At the second trial, the Crown argued that Guy Paul Morin's failure to attend the funeral home and the funeral, as well as his failure to express his condolences to the Jessop family were indicative of his consciousness of guilt. The defence, on the other hand, took the position that these so-called failures of Guy Paul Morin were not aberrant behaviour and had absolutely no significance to his innocence or his guilt.

²⁵ Nechay was a York Regional officer seconded to the Durham investigation.

²⁶ The prosecution also contended that Guy Paul Morin's suggestion that he was not 'invited' to the funeral was problematic.

The second issue raised was the hearing of screams at about 7:00 p.m. on the night of the funeral. Several people present at the Jessop house after the funeral purportedly heard the screams. They described them as a male voice coming from outside the house, north of the Jessop residence, crying "God, help me, oh please, God, help me!" Janet Jessop testified at the second trial that she recognized the voice as that of Guy Paul Morin, and that when she was outside she saw a silhouette moving quickly through the back door of the Morin house. There was no evidence called about this incident at the first trial. The first police report of the screams was recorded on May 25, 1985, several months after the funeral. At that time, Janet Jessop spoke to Detective Frank Raymond Bunce of the York Regional Police. Detective Bunce's report does not record being advised by Ms. Jessop that she had personally heard the screams or that she recognized the voice of the person who had been screaming. This purported recognition was only noted in a police report in September 1989, four years later. And she did not advise the police of her sighting of the silhouette moving quickly through the backdoor of the Morin house until May 30, 1991. Both Ken Jessop and Guy Paul Morin denied having screamed on the night of Christine Jessop's funeral. At the second trial, the Crown argued that Guy Paul Morin's cries for help on the night of Christine Jessop's funeral were evidence of consciousness of guilt. The defence, on the other hand, took the position that evidence relating to the screams, in all of the circumstances, was false.

(xii) The Cigarette Butt

On December 31, 1984, the date Christine Jessop's body was found, a cigarette butt was located in the general area of her remains. It was tagged, bagged and photographed by Sergeant Michalowsky, the senior identification officer who was in charge of the identification unit at the Durham Regional Police Service. It was an uncontested fact at both trials that Guy Paul Morin was not a smoker.

On December 10, 1985, Mary Bartley of Mr. Ruby's office met with Sergeant Michalowsky and John Scott. Upon viewing photographs taken at the body site on December 31, 1984, Ms. Bartley learned of the finding of the cigarette butt. Apparently Sergeant Michalowsky commented to her something to the effect that "we even find our own officers' cigarette butts."

On December 27, 1985, a meeting took place involving the Crown

attorneys John Scott and Susan MacLean (the two prosecutors at the first trial) and officers who had attended at the body site on December 31, 1984. The purpose of the meeting was to determine the involvement of each officer. According to Constable Cameron, during the meeting John Scott inquired of Sergeant Michalowsky as to the whereabouts of the cigarette butt. Constable Robinet also recalled an issue being raised at the meeting about finding the cigarette butt. In his evidence at the second trial in June, 1992, Sergeant Michalowsky denied that the cigarette butt had ever been lost or that anyone asked him to find it. The evidence was that at the December 27, 1985 meeting, John Scott wanted to know whose cigarette butt it was. Constable Robinet's recollection, five years later, was that Cameron claimed ownership of the cigarette butt at the meeting. However, Robinet subsequently came to question his recollection. Cameron denied claiming the butt as his own at the December 27, 1985 meeting.

Following this meeting and prior to the commencement of the first trial on January 7, 1986, Detective Fitzpatrick called officers he knew to be smokers who had attended at the body site on December 31, 1984 to inquire whether they had been smoking at the scene and had disposed of a cigarette butt. In a telephone discussion between Detective Fitzpatrick and Constable Cameron, Cameron recalled he had been smoking at the body site; he had discarded a Craven Menthol cigarette butt upon realizing he was entering the homicide scene.

On January 10, 1986, shortly after the beginning of the first trial, Sergeant Michalowsky testified that a cigarette butt marked as an exhibit at the trial was the butt found in the vicinity of Christine Jessop's body. He testified that another exhibit, a photograph taken on December 31, 1984, depicted the same cigarette butt with the grass around it pulled back. On January 12, 1986, a meeting was held between police investigators and Crown attorneys Scott and MacLean. Prior to the meeting, Detective Fitzpatrick told Constable Cameron that he believed that the cigarette butt found at the body site was the one that Cameron had thrown away, and Cameron assumed that this was correct. And at the meeting with the Crown and the police, he (Cameron) described how he had indeed discarded the butt along the path as he approached the area where the remains were located on December 31, 1984.

On January 13, 1986, the day following the meeting, Constable

Cameron testified at the first trial that he had butted his cigarette at the body site on December 31st, 1984, and flicked it to the side of a path. That evening, however, Constable Cameron asked Sergeant Michalowsky when the cigarette butt had been discovered. From Sergeant Michalowsky's answer, Constable Cameron determined that the butt had been discovered prior to his arrival at the body site. Accordingly, he felt that the butt could not have been his. At the second trial, Cameron testified that he contacted Detective Fitzpatrick and Crown attorney Susan MacLean to advise them of this fact but he was unsure of precisely when he did this. In cross-examination at the first trial, Constable Cameron testified that the brand of cigarette he regularly smoked was Craven Menthol. During the subsequent cross-examination of Inspector Shephard at the first trial, he noted that the cigarette butt, tendered as an exhibit, was not a Craven Menthol. On March 14, 1990, prior to the second trial, it was discovered that Sergeant Michalowsky had prepared duplicate notebooks of the Morin investigation. The second set of notebooks included an account of a conversation at the body site in which Constable Cameron allegedly indicated to Michalowsky that the cigarette butt found in the area was his. Ultimately, at the second trial, the Crown conceded that the cigarette butt introduced at the first trial was not the one found at the body site, and was not the butt depicted in the photograph marked as an exhibit. The Crown also conceded that the cigarette butt depicted in the photograph taken at the body site had been lost.

Sergeant Michalowsky testified at the second trial that it was only on May 29, 1990, in the course of being questioned by the Ontario Provincial Police (OPP) that he became aware that another photograph tendered as an exhibit at the first trial, depicted not a cigarette butt, but a piece of birchbark. He added he did not know how it came to be that the cigarette butt tendered in evidence at the first trial was not the cigarette butt found at the body site in the vicinity of the remains of Christine Jessop.

In the summer of 1990, following an Ontario Provincial Police investigation, Sergeant Michalowsky was charged with perjury (for allegedly knowingly making false statements under oath), wilfully attempting to obstruct justice (for allegedly preparing and testifying from the second undisclosed notebook), and wilfully attempting to obstruct justice (for allegedly tendering a cigarette he falsely claimed to have seized at the body site). On November 12, 1991, these charges were stayed by the Honourable Mr. Justice O'Connell of the Ontario Court of Justice (General Division), due

to Michalowsky's ill health.

The Crown declined to call Sergeant Michalowsky as a witness. The defence brought a variety of applications in response. The defence position was that if the Crown elected not to call Sergeant Michalowsky, it was precluded from leading the expert opinion evidence regarding hair and fibre exhibits which had at one time been in Sergeant Michalowsky's possession and control. Without the evidence of Sergeant Michalowsky, the defence submitted there was no foundation for that opinion evidence. The trial judge ruled that the hair and fibre evidence was admissible without the necessity of the Crown calling Sergeant Michalowsky in that there was evidence identifying the exhibits in question. The issue of continuity was not a matter of admissibility but of the weight to be assigned to the evidence.

The defence brought a second application to compel the Crown to call Sergeant Michalowsky, as a consequence of the Crown being allowed to file hair and fibre exhibits. In the alternative, the defence sought an order compelling the Crown to call Michalowsky for the purpose of making him available to the defence for cross-examination, or, in the further alternative, an order whereby the Court would call Michalowsky. The trial judge ruled that none of these orders were required to ensure a fair trial, noting that Sergeant Michalowsky had testified for five days on the stay application and the defence may have resort to section 9 of the *Canada Evidence Act*.

The defence subpoenaed Sergeant Michalowsky. Counsel for Sergeant Michalowsky applied for an order quashing the subpoena issued to Michalowsky on the basis that his physical and emotional health did not permit him to testify. On the application, several doctors were heard. Mr. Justice Donnelly ruled that subject to Dr. Rowsell's final opinion, Sergeant Michalowsky would testify in the presence of Dr. Rowsell who would monitor Michalowsky's condition and advise as to the taking of recesses.

The trial judge also directed that certain informal circumstances be arranged for Sergeant Michalowsky's evidence. Although the matter proceeded in the courtroom with the jury in the jury box, neither counsel nor the trial judge were gowned. All parties remained seated. The courtroom was arranged in such a way that all parties, including the trial judge, were on floor level. The media and public had access to the courtroom. Sergeant Michalowsky was seated so that his back was to the public. Justice Donnelly

further directed that Sergeant Michalowsky's testimony be videotaped to preserve the record of this extraordinary situation.

(xiii) The Hair and Fibre Evidence

Forensic evidence relating to hairs and fibres was a significant part of the Crown's case against Guy Paul Morin. At the first and second trials, the Crown led expert evidence which allegedly linked Guy Paul Morin and the Morin Honda to the murder of Christine Jessop as follows: First, a hair found on Christine Jessop's necklace could have come from Guy Paul Morin. Second, three hairs found in the Morin Honda could have come from Christine Jessop. Third, six or seven fibres found on Christine Jessop's clothing and on her recorder case at the body site, could have come from the same source as five fibres found in the Honda and in the Morin home. The Crown led evidence as to the significance of those cumulative findings.

According to Mr. Morin and his parents, neither Christine Jessop nor her parents had ever been inside their home or in the Morin Honda. The Crown therefore argued that the fibre 'matches' could be logically explained only if Guy Paul Morin was in fact Christine Jessop's abductor and killer. On the other hand, the defence position at the second trial was that the hair and fibre evidence was not of significant probative value and defence experts were called who disagreed with many of the hair and fibre similarities found by the Crown experts. Further, according to the defence experts, the fact that a common source for the fibres had not been found suggested that any fibre similarities could be explained by the fact that Guy Paul Morin and Christine Jessop lived in neighbouring houses and, as such, opportunities existed for fibres to be transferred between the two households. The defence also challenged the hair and fibre evidence on the basis that the way in which this evidence was collected and stored by the police, created a risk of contamination which might explain any fibre matches. The defence questioned the integrity and the reliability of this evidence.

(xiv) Police Contacts with Guy Paul Morin Before his Arrest

On February 14, 1985, Detective Fitzpatrick noted after a conversation he had with Janet Jessop that Guy Paul Morin played the clarinet and was a "weird-type guy." On February 19, 1985, surveillance was set up on the Morin house.

Inspector Shephard and Detective Fitzpatrick wanted to interview Guy Paul Morin away from his family, and they unsuccessfully attempted to do so by having an official from the Department of Transportation telephone him to arrange for a licensing interview. It was Shephard's evidence and the Crown's position that at this time Guy Paul Morin was sought as a potential witness and not as a suspect, notwithstanding the fact that Fitzpatrick had made a February 20th entry in his notebook which read "Suspect Morin in Toronto." On February 22, 1985, Fitzpatrick and Shephard visited the Morin residence.

Guy Paul Morin agreed to speak to them in their cruiser, and they spoke for between an hour and two-and-a-half hours. Although Guy Paul was not aware of it, the police officers were recording the interview. However, the tape recording of the interview ran out after 45 minutes. The detectives said they believed that the tape would record for 90 minutes rather than for only 45 minutes. Inspector Shephard took point-form notes as well as a witness statement, though Guy Paul Morin never saw or signed either of these documents. At the trial, the Crown suggested that many of the comments made by Morin during the course of this interview were evidence of his guilt.

First, Morin told Shephard and Fitzpatrick that while one media account had wrongly reported that Christine Jessop's body had been found west of Queensville, he knew that her remains had been found across the Ravenshoe Road. Until then, Shephard and Fitzpatrick had not known that the Ravenshoe Road was a main road leading eastward from the Queensville area in the direction of the body site. Second, Guy Paul Morin told Fitzpatrick and Shephard that Christine Jessop was a very innocent child, not aware of anything bad out there. He later said something to the effect that 'All little girls are sweet and beautiful, but grow up to be corrupt.' This statement, it was suggested at the second trial, revealed a motive on the part of Guy Paul Morin to kill Christine Jessop because her death would prevent her from growing up to be corrupt. Third, at one point in the conversation, Guy Paul Morin said, "Otherwise, I'm innocent." Shephard and Fitzpatrick had not said anything to Morin to suggest that he was a suspect. Morin went on to tell them that York Regional Police had said that all Queensville residents were suspects until proven otherwise. Finally, Morin told Fitzpatrick and Shephard that he was a musician and that he played the clarinet and saxophone. He also told them that he had learned through the media that Christine Jessop supposedly played the recorder. At the

conclusion of this interview, Shephard and Fitzpatrick theorized that, perhaps, Christine Jessop had proudly showed her new recorder to Morin on her return home, or he had somehow seen her with it, and he had used this common interest in music to engage her in conversation, and then abducted her. This theory was presented by the Crown to the jury at the second trial.

On the other hand, the defence's position was that the conversation that Guy Paul Morin had with Fitzpatrick and Shephard on February 22, 1985, was demonstrative of Guy Paul Morin's innocence, and that there was nothing sinister in anything that he had said. First, the Ravenshoe Road was a primary route going east from Queensville in the direction of the body site. A map of the area made that fact clear. Other Queensville residents, including police officers, described the Ravenshoe Road in this way. The fact that Shephard and Fitzpatrick, who were unfamiliar with the Queensville area, did not know that the Ravenshoe Road was one of the major roads going east from Queensville was irrelevant to Morin's guilt or innocence.

As to Morin's comment about all little girls being sweet and beautiful but growing up to be corrupt, the defence maintained that it only showed that Guy Paul Morin believed that Christine Jessop was too young and too innocent to have been involved in any trouble. The defence further contended that Guy Paul Morin only said "Otherwise, I'm innocent" as a sardonic, somewhat resentful preamble to his recitation of his complaints about York Regional Police investigators who had publicly treated everyone in Queensville as suspects until proven otherwise.

Finally, the defence argued that Guy Paul Morin would never have embarked on a conversation with the police about his musical interest, and about Christine Jessop's recorder, had he truly abducted Christine by using their mutual interest in music.

(xv) The Arrest and Search

Inspector John Shephard arrested Guy Paul Morin at about 7:45 p.m. on April 22, 1985, while Morin was driving in the family Honda to his band practice in Stouffville. Detective Fitzpatrick searched him. Inspector Shephard looked inside the car, which was later seized and delivered to the Centre of Forensic Sciences in Toronto. Morin was taken to the police station, where he arrived shortly after 8:00 p.m. At the station, Guy Paul

Morin volunteered samples of his hair, blood and saliva, which were subsequently delivered to the Centre of Forensic Sciences. The same night, at about 10:20 p.m., the police executed a search warrant at the Morin residence.

Mr. Morin proclaimed his innocence throughout the six hour interrogation following his arrest. In the course of questioning he produced a penknife which was ultimately tendered into evidence at both trials as a possible murder weapon. The Crown did not tender the statement upon arrest at either of Mr. Morin's trials. At his second trial the defence sought to introduce the statement in support of Mr. Morin's alibi. The trial judge ruled the statement was inadmissible.

The officers who participated in the search of the Morin residence had been provided with a list of articles for which they were to search. These included a knife, buttons missing from Christine Jessop's blouse, and a blue woollen sweater that belonged to her, shirts or jackets with blood stains, a gold-coloured seat cover, a coat or collar with animal hair, anything relating to sex, and anything else that may have appeared to be related to the case. They were also to examine any photographs they found.

The police were to search for a gold-coloured seat cover because (on their evidence) on March 8, 1985, Stephanie Nyznyk, a forensic analyst at the Centre of Forensic Sciences, had told Shephard and Fitzpatrick that there were gold-coloured fibres on Christine Jessop's clothing taken from the body site that were consistent with the type of fibres used in the manufacture of upholstery and floor coverings for vehicles. (It was Ms. Nyznyk's reported findings about the hair and fibre evidence that had largely prompted the police to arrest Mr. Morin.) The searchers were divided into three teams headed by identification officers Sergeant Michalowsky, Constable David Emile Robinet, and Constable Harry Shephard. The Robinet team searched the upstairs bedrooms and collected 81 exhibits. Michalowsky's team searched the property itself, including the beehives located there, a shed, an old Lincoln car on the property, and a 1980 Ford pick-up truck in the garage. They also re-searched an upstairs bedroom, and they seized 18 exhibits. The team headed by Shephard searched the northwest ground floor bedroom, the living room, television room and basement, and they seized 50 exhibits. All exhibits were taken to the identification laboratory at 17 Division of Durham Regional Police, and Sergeant Michalowsky delivered 141 of these exhibits

to the Centre of Forensic Sciences on May 7, 1985. Only one dark grey fibre found on the living room rug ultimately proved to be of any significance to the prosecution.

(xvi) The Finding of Additional Bones

During and after January 1985, on several occasions, members of the Jessop family visited the site where Christine Jessop's body was found. On May 10, 1985, Robert, Janet, and Ken Jessop met with John Scott. Following the meeting they visited the body site. At about 5:10 p.m., Ken Jessop found an indentation in the ground that appeared to have been dug out. It was five or six inches deep. Nearby was a birch tree which had been scorched, and a patch of burnt grass. Robert and Ken looked inside the burnt area and found four bones. One was similar to a rib, and one was similar to a vertebra. One had a hair attached to it, and one was not initially recognizable.

They took the bones out of the hole and placed them in a styrofoam cup. They then took the bones to a police station in nearby Sunderland, and at about 5:30 p.m. they turned them over to Constable Lorne Annis of Durham Regional Police. Extremely upset, Robert Jessop called Mr. Scott about the matter the same day. P.C. Annis gave the bones to Constable Harry Shephard in the identification unit at Durham Regional Police headquarters in Oshawa. On May 13, 1985, Constable Shephard examined the bones, and he examined them again on the 14th with Michalowsky. The bones were subsequently submitted to the Centre of Forensic Sciences. The fact that the Jessops found bones at the body site was never revealed at the first trial or otherwise disclosed to Guy Paul Morin's first defence counsel, Clayton Ruby.

(xvii) The Jailhouse Informants

After his arrest on April 22, 1985, Guy Paul Morin was placed in custody in the Whitby Jail. His application for bail had been denied. On June 26, 1985, he had been committed to stand trial on a charge of first degree murder after a preliminary inquiry before His Honour Judge Norman Edmondson. While in custody he encountered two inmates, Robert Dean May and Mr. X. May had 11 convictions for various offences, including crimes of dishonesty. Mr. X had a juvenile and adult record for multiple offences involving sexual abuse of young people. Both men had undergone psychiatric assessments in custodial institutions which reflected on their anti-

sociability and reliability. Both admitted lying to the authorities and others in the past.

Mr. Morin was in a cell with May in late June 1985; Mr. X was in an adjoining cell. On July 1, 1985 May and X contacted the police and, after some negotiations for benefits for themselves, told the officers that Morin had confessed to May the night before that he had "killed that little girl." Allegedly, X had overheard the confession.

Both May and X testified for the prosecution at the first trial as to the confession. In his testimony at the first trial, Guy Paul Morin denied that he had made such a confession. The prosecution relied on the confession as proof of guilt. On the other hand, the defence denigrated the evidence of both informants, alleging that they were lying about the purported confession and that their motive for concocting the confession was to obtain benefits from the authorities.

(xviii) The Offer

At the second trial, both May and X were again called as witnesses for the prosecution. Both again testified about the alleged confession made by Morin. In addition, both told the jury that the prosecuting authorities had offered each of them the right to refuse to be a witness if he so chose. Their subpoenas would not be enforced and they would suffer no consequences. Both testified that they had refused the offer and were, therefore, giving their evidence voluntarily. The prosecution took the position that the informants' voluntary attendances at the trial strengthened the credibility of their testimony. Guy Paul Morin gave evidence denying that he had made any confession. The defence at trial unsuccessfully raised concerns about the *bona fides* of the prosecution's offer to the informants. (This issue was raised again at this Inquiry, and became a major subject of dispute.)

(xix) The First Trial

On October 7, 1985, Mr. Justice John Osler granted a defence application for an order changing the venue for the trial. In directing that the trial take place in London, Mr. Justice Osler considered the extensive media coverage in the case, including press releases both before and after Mr. Morin's arrest relating to details of a psychological profile of the killer

prepared by an experienced F.B.I. profiler. Following Mr. Morin's arrest, Superintendent Doug Bullock was quoted in the news media as saying the profile matched Guy Paul Morin better than the other four suspects being investigated.

Mr. Morin's first trial, presided over by the Mr. Justice Archibald McLeod Craig, began on January 7, 1986, and lasted approximately four weeks. Mr. Morin was represented by Clayton Ruby and Mary Bartley; John Scott and Susan MacLean appeared on behalf of the Crown.

At the first trial, it was the Crown's theory that Morin left work on October 3, 1984, arrived home about 4:30 p.m., lured Christine Jessop into his car and took her to the body site in Durham Region where he sexually assaulted and killed her before returning home to Queensville. At that trial, the Crown relied mainly on:

1. Evidence of Morin's opportunity to commit the crime;
2. Statements made by Morin to police in February 1985, allegedly demonstrating consciousness of guilt;
3. Hair and fibre evidence, including evidence of a hair found embedded in Christine Jessop's necklace which allegedly 'matched' Morin's hair, evidence of three hairs found in Morin's car which allegedly 'matched' the hair of Christine Jessop, and the 'matching' of other fibres and animal hairs found at the murder scene and in Morin's home and car;
4. The evidence of undercover police officer, Sergeant Gordon Hobbs, who testified that while in the Whitby Jail, Morin had made stabbing motions towards his own chest, allegedly demonstrating the means by which he had murdered his victim;
5. Statements made to the undercover officer which allegedly showed consciousness of guilt;
6. Morin's alleged confession to a cell mate, Robert Dean May, which confession was allegedly overheard by Mr. X.

The defence position at the first trial was that, given his itinerary on October 3, 1984, Guy Paul Morin could not have committed the crime charged against him. The position was that Morin left work northwest of Toronto at 3:32 p.m., stopped at a Newmarket shopping mall lottery booth, a grocery store and a gas station and then went on to two other grocery stores before arriving home between 5:00 and 5:30 p.m. He then took a nap, had dinner, and went outside to do some home renovations.

The defence also argued that even if Morin had arrived home at 4:30 p.m., he still would not have had sufficient time to commit the offence. At the first trial, in the alternative, the defence argued that if the jury were to find that Morin did kill Christine Jessop, he was not guilty by reason of insanity. In support of this alternative defence, the defence called expert psychiatric testimony to the effect that Morin suffered from schizophrenia, and if he did in fact commit the killing he would not have appreciated the nature and quality of his act. At the end of the trial, on February 7, 1986, Guy Paul Morin was acquitted by a jury after its members had deliberated for approximately 13 hours.

(xx) The Crown Appeal

By Notice of Appeal dated March 4, 1986, the Attorney General of Ontario launched an appeal to the Court of Appeal for Ontario against the acquittal. There were two bases for the Crown's appeal: first, that the trial judge had misdirected the jury as to the application of the doctrine of reasonable doubt to the evidence at trial. The trial judge had directed the jury that if they had a reasonable doubt with respect to individual items of evidence, they should give the benefit of that doubt to the accused. The second ground of appeal was that the jury had been incorrectly instructed that evidence of the accused's psychiatric condition was admissible only on the issue of the defence of insanity and could not be used as evidence of guilt. The Court of Appeal allowed the Crown's appeal on both grounds (Cory J.A., as he then was, dissenting) and ordered a new trial for Morin on the charge of first degree murder.

(xxi) Morin's Appeal to the Supreme Court of Canada

Mr. Morin appealed to the Supreme Court of Canada against the reversal of his acquittal. On November 17, 1988 the Supreme Court

dismissed his appeal and upheld the Court of Appeal's decision to order a new trial based on the misdirections as to reasonable doubt only.

(xxii) A Further Autopsy

On October 31, 1990, the remains of Christine Jessop were exhumed. A post-exhumation examination led by Dr. Clyde Snow, a forensic anthropologist, commenced the same day and continued over the following two days. Dr. Snow was an expert in skeletal identification, and he examined the exhumed skeleton for the purpose of making an inventory of the bones and determining whether bones found subsequent to the discovery of the body belonged to the same skeleton.

During the course of his inventory, he realized that injuries were apparent which had not been described in the original autopsy report and he requested the presence of a pathologist. A forensic pathologist, Dr. Hans Sepp joined him on November 1, 1990. Dr. Snow formed the opinion that all the bones, including those found by the Jessops on May 10, 1985, did belong to Christine Jessop. He concluded that 94 per cent of the bones had been recovered. A number of inadequacies in the original autopsy were revealed. Dr. Hillsdon-Smith later acknowledged those inadequacies.

As to the injuries observed on the remains of Christine Jessop, the remains were examined by Dr. Sepp on November 1, 1990 and he agreed with the conclusion of Dr. Hillsdon-Smith at the first autopsy that the cause of death of Christine Jessop was stab wounds to the body. There was disagreement, however, between Dr. Snow and Dr. Sepp as to the nature and cause of the some of the injuries evident to the bones.

(xxiii) The Pre-Trial Motions

The re-trial was scheduled to commence on several occasions following the Supreme Court of Canada decision on November 17, 1988 affirming the order for a re-trial. On each occasion the defence sought and obtained an adjournment. In September 1989, Mr. Morin waived his right to be tried within a reasonable time.

In March 1990, potential police misconduct on the part of the chief identification officer, and revelations relating to sexual activity on the part of

others with Christine Jessop, came to the attention of the Crown attorneys and was disclosed to the defence.

On April 5, 1990, defence counsel wrote to the then Assistant Deputy Attorney General requesting Mr. John Scott's removal from the case, alleging gross misconduct concerning the duty of disclosure on the part of Mr. Scott. The following day, on April 6, 1990, defence counsel filed an application with the Supreme Court of Canada for a rehearing of Mr. Morin's appeal or a stay of the order based on fresh evidence of material non-disclosure and misleading disclosure which had made the Crown's case appear more cogent than it actually was. It was further submitted that non-disclosure and misleading disclosure constituted an abuse of process or a breach of Mr. Morin's *Charter* rights. Affidavits were filed on the application.

On May 14, 1990, at the conclusion of the hearing before five members of the Supreme Court of Canada, Sopinka J. delivered the judgment dismissing the motion, holding that it was impossible to say on the basis of the untested evidence tendered on the application whether the decision affirming the order for a new trial would have been different. The Court further held that the trial court was the appropriate forum to deal with the issue of whether non-disclosure and misleading disclosure constituted an abuse of process or a *Charter* violation.

Mr. Morin's second trial commenced on May 28, 1990, with the hearing of two defence motions. The first motion was for access to the complete investigative file ('open box' disclosure) which the defence submitted was necessary for a complete evidentiary basis for the stay motion and for full answer and defence at trial. The second motion was for a stay of proceedings on the basis that non-disclosure and misleading disclosure, combined with police misconduct, rendered the first trial proceedings an abuse of process and a breach of Mr. Morin's section 7 and 11(d) *Charter* rights. Section 7 provides persons with "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 11(d) entitles anyone charged with an offence "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Evidence applicable to both motions was heard over the course of the

next seven months, constituting 80 court days and 7,000 pages of transcript. One hundred and three witnesses were called, nine of whom were called by the Crown. The evidence concluded on December 5, 1990. On November 13, 1990, the trial judge dismissed the application for 'open box' disclosure, for reasons to follow. On February 8, 1991, Mr. Justice Donnelly dismissed the motion for a stay of proceedings and released his lengthy reasons for judgment on both motions.

In dismissing the motion for 'open box' disclosure, Donnelly J. found that the law was as stated by Sutherland J. in his judgment on the disclosure motion at Mr. Morin's first trial.²⁷ In particular, the *Charter* did not create a constitutional entitlement by the defence to all facts within the knowledge of the police or Crown in some way related to the investigation of the offence. Mr. Justice Donnelly also concluded that the defence had not met its burden of establishing the existence of still undisclosed exculpatory evidence capable of supporting the application to stay the proceedings.

The motion to stay was based on the alleged suppression of exculpatory evidence primarily relating to:

- evidence relevant to Mr. Morin's opportunity to commit the offence;
- evidence relating to other suspects, suspicious vehicles and suspicious sightings;
- the finding by the Jessops of bones at the body site in May, 1985;
- an OPP report concluding that an impression on Christine Jessop's recorder was unsuitable for fingerprint comparison;

²⁷ Prior to the commencement of Mr. Morin's first trial, the defence moved for further disclosure before Mr. Justice Sutherland, who held that he did not have jurisdiction to order pre-trial disclosure and that the appropriate forum was the trial judge. In addition, Sutherland J. held section 7 of the *Charter* did not create additional rights to pre-trial disclosure: *R. v. Morin* (1985), 23 C.C.C. (3d) 550. The motion was later renewed at the commencement of the first trial.

- evidence relating to the forensic aspects of the prosecution's case, *i.e.*
 - (a) it was not disclosed that hair samples were obtained from Christine Jessop's classmates for elimination purposes with regard to the 'necklace hair.' Further, these hairs were submitted to the Centre of Forensic Sciences for testing in November, 1987 but examinations were not conducted until January, 1989. The results showed that the necklace hair was as 'consistent with' two of the classmates' hairs as it was with Guy Paul Morin's hair;
 - (b) a 'laundromat test' conducted by the police during the first trial at the instance of the Crown and relevant to the issue of contamination between the Jessop and Morin households was not disclosed. The test result showed obvious transfer of fibres.

The motion was also based on the loss of physical and documentary evidence, as well as lost memories given the passage of time, and on police misconduct.

In dismissing the application for a stay, Donnelly J. did not find a lack of good faith on the part of either the Crown or the police with regard to disclosure. He concluded that there had been no "suppression" of evidence. Rather, through inadvertence or a failure to consider the matter, some information had not been disclosed. The defence did not meet the onus of establishing, on a balance of probabilities, that Mr. Morin's re-trial would clearly violate fundamental principles of justice underlying the community's sense of fair play and decency, thus disentitling the community to a proper trial on the merits.

Donnelly J. concluded that the Crown's theory of opportunity and the place of the abduction was not dependent on the non-disclosed evidence relating to the time of the Jessops' arrival home. Further, the general request by the defence for "all evidence tending to show innocence" did not enlarge

the Crown's duty to disclose plainly exculpatory material within the Crown's knowledge. In the absence of specific disclosure requests relating to general topics of concern, the Crown should not bear the unreasonable burden of speculating as to information capable of becoming exculpatory evidence. No disclosure interest had been specifically directed towards other suspects, suspicious vehicles or suspicious sightings, the analysis of a partial fingerprint on Christine Jessop's recorder, or hair samples taken from Christine Jessop's classmates.

Donnelly J. found that the police failure to preserve items of evidence did not demonstrate the requisite bad faith on the part of the police. Proper instructions would allow the jury to properly assess the evidence of apparent misconduct on the part of the chief identification officer which had been fully disclosed. Further, having waived his right to be tried within a reasonable time, Mr. Morin could not later complain of the extensive loss of evidence caused by the six year delay in disclosure.

A laundromat test conducted at the instance of the Crown showing fibre transfer was found to be pre-trial preparation and not discoverable. Evidence of screams emanating from the body site relating to the theory of when the murder took place was not viewed as a serious transgression in light of concerns about the reliability of this evidence.

Donnelly J. held that certain information should have been disclosed by the Crown. However, he found the failure to do so the result of inadvertence, not wilfulness. This evidence related to the matters relevant to the credibility of the jailhouse informants, later sightings of Christine Jessop, early reports as to the time of the Jessops' arrival home the day of the disappearance, and the May 10, 1985 discovery of bones at the body site (relevant to the quality of the investigation). Other information, exculpatory on its face, was found by the trial judge not to have been made known to the Crown by the police, although he found it should have been. These included reports of phone calls received by Christine Jessop from an older man, and later sightings of Christine Jessop.

On March 8, 1991, the month following the release of this decision, the defence unsuccessfully applied for a further rehearing of the appeal before the Supreme Court of Canada on the basis of that Court's earlier reasons and the evidence before Donnelly J. on the stay motion.

In April 1991, and continuing to August 1991, a number of other pre-trial motions were heard by Mr. Justice Donnelly, dealing with a variety of issues. One of his rulings was the exclusion of Sergeant Hobbs' evidence, pursuant to the Supreme Court of Canada decision in *R. v. Hebert*,²⁸ which prohibited the 'active eliciting' of statements from detained persons by state agents. Other rulings are specifically referenced elsewhere in this Report. Jury selection was completed on November 12, 1991, and on the following day the jury members heard the Crown's opening address.

On November 14, 1991, Mr. Morin sought to reopen the motion to stay the proceedings on the basis of the seminal decision of the Supreme Court of Canada in *Stinchcombe*, released on November 7, 1991. That decision dealt with the disclosure obligations of the Crown.

On February 24, 1992, Donnelly J. dismissed this motion, finding no reason to alter his earlier conclusions.

On March 30, 1992, the defence sought to reopen the 'open box' disclosure motion, again on the basis of *Stinchcombe*. Donnelly J. dismissed this application the same day, finding that disclosure since the original open box application had been voluminous, as indicated to him by the exchange of 225 letters and two banker's boxes of materials relating to 300 potential suspects.

(xxiv) The Second Trial

The trial before the jury spanned a period of approximately nine months, during the course of which 120 witnesses were called. At the second trial, it was the theory of the Crown that, on October 3, 1984, some time between 3:32 p.m. when he left work and 4:30 to 4:35 p.m. when Janet and Kenneth Jessop returned home, Guy Paul Morin took nine-year-old Christine Jessop from her home or from the immediate vicinity of her home into his Honda motor vehicle and drove her across the Ravenshoe Road to a location some 30 miles away.

There, the Crown theorized, Morin sexually assaulted the girl, and

²⁸ (1990), 57 C.C.C.(3d) 1 (S.C.C.).

then stabbed her to death with a knife he habitually carried with him. The Crown alleged that Morin then returned home in his vehicle, leaving the dead body of Christine Jessop in this remote rural location.

In support of its theory, the Crown led evidence from Mr. May and Mr. X that, while incarcerated in the Whitby Jail pending his first trial, Morin confessed that he had in fact killed the girl.

The Crown also led evidence of Morin's alleged motive to kill Jessop, his opportunity to do so, expert forensic evidence relating to findings of hairs and fibres allegedly linking Morin to the killing, and evidence alleged to reflect Morin's consciousness of guilt. This evidence is elaborated upon throughout this Report.

At the second trial, the defence of Guy Paul Morin was advanced on only one ground. The defence position was that Guy Paul Morin was not the killer of Christine Jessop and that the police had arrested the wrong person. Counsel for the defence argued that Morin could not have abducted Christine Jessop because he had no opportunity to do so.

In support of his alibi, the defence called Guy Paul Morin, his father and his mother as witnesses. The Crown argued that this alibi was fabricated by Morin and his parents to enable Guy Paul Morin to escape responsibility for the murder.

The jury retired to deliberate on July 23, 1992, and seven days later returned a unanimous verdict finding Guy Paul Morin guilty of first degree murder.

(xxv) The Second Appeal

By Notice of Appeal dated August 22, 1992, Guy Paul Morin launched an appeal from his conviction to the Court of Appeal for Ontario. On November 30, 1992, Mr. Morin applied for bail pending his appeal. On February 9, 1993, the application for bail was granted by Mr. Justice Marvin Catzman and Guy Paul Morin was released from custody. There were 181 grounds of appeal. On appeal, Guy Paul Morin sought to adduce fresh evidence relating to two issues: first, as to the reliability of the evidence of Robert Dean May; second, as to the significance of the hair and fibre

evidence adduced by the Crown at the second trial. These applications were ultimately unresolved, given the availability of new DNA results obtained just days before the appeal was to be heard.

As to the first (the reliability of the evidence of Robert Dean May) — subsequent to the second trial, evidence surfaced which impacted on the credibility of Robert Dean May's testimony at both of Morin's trials. This evidence was examined extensively in Phase I of this Inquiry.

As to the second (that relating to the hair and fibre evidence) — at the second trial emphasis was placed on a 1986 research paper by Roger Cook and Graham Jackson entitled "The Significance of Fibres Found on Car Seats."

Cook and Jackson were fibre examiners for police forensic science laboratories in England, and their study sought to examine the significance of finding fibres in cars to criminal cases. On the fresh evidence application, the defence filed an affidavit by Roger Cook, one of the authors of the Jackson and Cook study, in which he concluded that the study was misused by the prosecution in a number of ways. Mr. Cook was cross-examined by Crown counsel on that affidavit.

(xxvi) The DNA Evidence

The underpants and blouse seized from the body site of Christine Jessop were filed as exhibits at the first trial of Guy Paul Morin. At the time, the blood and semen stains on Christine Jessop's underpants could not be typed for DNA because of the deterioration which had resulted from exposure to the elements and because of the state of the science at that time. Subsequent attempts at DNA typing of the semen were renewed by the Crown and by the defence from 1988 to 1991. None of these attempts was conclusive.

In October 1994, the Chief Justice of Ontario ordered three scientists, Dr. David Bing of Boston, Massachusetts, Dr. John S. Wayne of McMaster University in Hamilton, Ontario, and Dr. Edward T. Blake of Richmond, California, to examine jointly all of the available semen samples and report whether further DNA testing would likely lead to a conclusive result. The renewed testing attempts began on December 12, 1994, and on January 18,

1995, the scientists recommended that DNA typing of the semen found on the underpants should proceed.

The next morning, counsel for the Crown and the defence authorized the typing to proceed, and later the same day, at 10:33 p.m., counsel were finally advised of the outcome of the testing. In a report addressed to Chief Justice Dubin dated January 20, 1995, Drs. Bing, Wayne, and Blake reported that they had been successful in DNA typing the sperm recovered from the underpants of Christine Jessop. They concluded that the DNA from the sperm sample could not have originated from Guy Paul Morin. This report was presented, on consent of both parties, to the Court of Appeal as fresh evidence.

(xxvii) The Acquittal of Guy Paul Morin

On January 23, 1995, Guy Paul Morin's appeal of his conviction for murder was allowed based on the new DNA report, his conviction was set aside, and a verdict of acquittal was entered.

N. Structure of this Report

The structure of this Report does not correspond, in all respects, to the way in which the Phases at the Inquiry were organized. For example, the forensic evidence is addressed first, given my findings as to the importance of that evidence to the miscarriage of justice. Also, given the overlap between the Durham Regional Police investigation and the trials of Guy Paul Morin, investigative and trial issues are often addressed together. There is sometimes a repetition of certain facts to give context to findings or recommendations. Generally, my findings of fact are subsumed under headings entitled 'Findings' throughout the Report. Otherwise, they are italicized. My recommendations are numbered and are in bold faced type. Generally, recommendations appear at the end of each chapter.

II

Forensic Evidence and The Centre of Forensic Sciences

A. Introduction

At both of Guy Paul Morin's trials, the prosecution placed substantial reliance on hair and fibre evidence tendered through forensic scientists who were (or had been) employed by the Centre of Forensic Sciences (the "CFS") in Toronto. Indeed, I was told that Crown counsel at the second trial regarded the hair and fibre evidence as some of the most significant evidence incriminating Mr. Morin.

As a result of the evidence tendered at this Inquiry, I am satisfied that the hair and fibre evidence collected from the body site, from Guy Paul Morin, and from his car and home was, essentially, valueless. Properly understood, it had little or no probative value in demonstrating Mr. Morin's guilt. Further, evidence only revealed at this Inquiry demonstrated that the fibre evidence was contaminated while in the possession of the CFS, suggesting that any findings relating to the fibre evidence may well have been tainted from the outset.

There is no doubt that the hair and fibre evidence was crucial to the decision to arrest Guy Paul Morin; its presentation to the jury at the second trial undoubtedly contributed to Mr. Morin's wrongful conviction. This chapter examines this, and other, forensic evidence tendered against Guy Paul Morin, the role that forensic evidence played in Mr. Morin's wrongful arrest and conviction, and it concludes with recommendations which might prevent the misuse of science in future criminal proceedings.

B. The Centre and its Scientists

The Centre of Forensic Sciences in Toronto is the principal laboratory where forensic examinations are conducted for criminal investigations in Ontario. It is a publicly funded institution, accountable to the Ministry of the Solicitor General. On a day-to-day basis, it is run by a Director. The laboratory is divided into five sections: biology, chemistry, firearms, toxicology, and documents and photography. Each section is administered by a section head and by an assistant section head. The biology section is of particular interest to this Inquiry, since it conducts, amongst other things, hair and fibre, serology and DNA testing.

Two forensic examiners, Stephanie Nyznyk and Norman Erickson, gave hair and fibre evidence at the instance of the prosecution in Mr. Morin's criminal proceedings.

Ms. Nyznyk was a forensic biologist, specializing in hair and fibre analysis. She joined the Centre as a trainee in 1979. She was largely trained in-house, and within two years, was accepted as a fully qualified analyst, responsible for her own files, with a caseload of 60 to 80 files per year. In January 1986, she testified for the prosecution at Mr. Morin's first trial. Shortly thereafter, she was in a serious car accident and ended full time employment with the CFS that year.

Prior to the second trial, Norman Erickson, then head of the biology section and himself a hair and fibre analyst for many years, was asked by the prosecution to review Ms. Nyznyk's findings and to conduct further examinations of the relevant hairs and fibres. It was feared that, because of her injuries, Ms. Nyznyk might not be physically able to testify at the second trial. As it turned out, both Ms. Nyznyk and Mr. Erickson were tendered by the prosecution as expert witnesses in 1992.

By then, Ms. Nyznyk had not worked as a forensic analyst for some time. She admitted that she had not re-examined the relevant fibres since 1986, and had spent about one hour re-examining the relevant hairs. Some of her original notes were missing, as were a number of slides containing original evidence.

At trial, the prosecution relied on the hair and fibre findings made by Ms. Nyznyk and Mr. Erickson to demonstrate that there was physical contact

between Christine Jessop and Guy Paul Morin, and that Christine was transported in the Morin Honda to her death by Mr. Morin. The evidence was said to refute Guy Paul Morin's denial that he had any physical contact with Christine and his specific assertion that Christine had never been in the Honda.

C. Definitions

To facilitate an understanding of the summary of evidence which follows, it is necessary to briefly define some of the terms used. These are not technical definitions, but those which I have derived from the substance of the evidence before me.

Hair and fibre evidence is a form of trace evidence. It is called trace evidence because it deals with often microscopic items found on a person or object. These items are compared for similarities or differences.

Hair evidence refers to comparisons between human or animal hairs. Hairs can either be shed or pulled out, and thereby transferred or deposited elsewhere.

Fibre evidence refers to comparisons between fibres of synthetic or animal origin. Such fibres may be components of clothing, furniture, carpeting and so on. Like hairs, they can either be shed or pulled out, and thereby transferred or deposited elsewhere.

Primary transfer refers to the transfer of hairs or fibres from one object to another through direct contact — for example, where a person's sweater rubs against a bus seat and deposits fibres upon it.

Secondary transfer refers to the transfer of hairs and fibres from one object to another, not through direct contact — for example, where fibres from a person's sweater are first deposited directly on a bus seat, and later transferred to the clothing of another person who subsequently sits on that seat. The transfer of fibres thus occurred from the first person to the second person without any contact between them. Of course, the transfer can be further removed, involving a number of intermediary steps.

Contamination refers to the presence of foreign items (including hairs

and fibres) on trace evidence, which were deposited onto or alongside that evidence during the collection, examination or storage of the evidence. For example, conclusions may be drawn from the similarity of fibres found at a body site and on an accused's clothing to prove his or her presence at the site. If some or all of the fibres compared were, in reality, deposited by investigators or scientists, the comparisons are meaningless. *Contamination* must not be confused with *environmental contamination*, which may explain why similar fibres are found on two different people or objects without direct contact between them. For example, two people may share the same environment (through adjoining properties or a common office or courtroom), within which fibres are transferred and deposited.

Extraneous fibres are fibres which do not form part of the make-up of a particular garment or other object. They are, rather, fibres which have been transferred to the garment, and are adhering to or are embedded in it.

Unknown hairs or fibres are hairs or fibres whose source, or place of origin, is unknown. They are normally compared to *known (or source) hairs or fibres*, the sources of which are known. It is significant to note that, where one extraneous fibre is compared to another extraneous fibre, there is no known source for the fibres. This may affect the strength of the conclusions which can be drawn from the comparison.

Taping and *vacuuming* represent two ways in which hairs, fibres and other items may be collected from an object or site.

Taping involves the application of adhesive tape to a surface in order to capture any hairs or fibres adhering to or embedded in the surface. The sticky underside of the tape attracts hairs, fibres and other items, often of microscopic size. This sticky underside is then stuck to one side of an acetate sheet, which is folded over the non-sticky outer surface of the taping to make a folder. The acetate sheet is later opened for the purpose of examining the taping attached to it. The taping is screened for hairs and fibres of interest. Once located, they are either marked for future removal or removed immediately. A scientist can access a desired fibre by either lifting up a part of the taping off the acetate sheet, or by making a V-shaped cut through the top of the taping or through the bottom of the acetate. The desired fibre is then pulled off the exposed underside of the taping with tweezers. A small amount of solvent is applied when needed to loosen the adhesive. The fibre is then *mounted* on a glass slide which has a substance on it ('perma-mount')

to ensure that it stays on the slide. The slide is then covered with a cover slip.

Vacuuming involves the use of a vacuum cleaner to collect items (including hairs and fibres) lying on or embedded in a surface. The collected items are stored in a vacuum bag.

D. How Hair and Fibre Comparisons are Made

Hair comparisons are conducted both on a macroscopic level, (*i.e.* by the naked eye) and on a microscopic level. A number of hair characteristics are regarded as noteworthy — for example, the hair's internal structure: how the pigment is distributed, whether the hair has a medulla (a central channel), and the type of medulla that is present.

Fibre comparisons may be effected through various kinds of examinations. For example, fibres may be compared simultaneously through a comparison microscope, or through microspectrophotometry ("MSP"), a process which measures the amount of light absorbed by the fibres. Both of these techniques were used on the Morin-related fibres.

Another means of fibre comparison is Thin Layer Chromatography ("TLC"). This is a process which allows the examiner to compare the dyes used to colour the various fibres. This process was not performed on fibres in the Morin case.¹

E. Inclusionary and Exclusionary Conclusions

The evidence is clear that hair comparisons can yield *exclusionary* results — that is, it is possible to definitively *exclude* someone as the donor of an unknown hair. To give the most obvious example: a blond-haired person can be excluded as the donor of a dark brown hair. A hair comparison which *excludes* someone as the donor of an unknown hair is an important investigative tool and can be of great evidentiary significance at trial.

¹ There are other tests which can be performed which are unnecessary to this narrative.

The difficult issue arises where hair comparisons are used for *inclusionary* purposes — that is, to permit an inference that a person (usually the accused) was the donor of an unknown hair.² The evidence is clear that hair comparisons cannot yield a conclusion that a person was *definitely* the donor of an unknown hair.³ The characteristics of a person's hairs vary from hair to hair, and they may differ even within a single hair on a person's body. Hair comparisons are *not* akin to fingerprint comparisons. Hairs are not unique, and the assessment of the similarities, differences and importance of hair characteristics is highly subjective. Efforts to quantify, through statistical analysis, the probability that a person was the donor of an unknown hair are not generally accepted in the forensic community — in my view, with good reason.

Fibre comparisons raise similar, though not identical, issues.

The forensic scientists who testified at the Inquiry outlined the different expressions used to describe the strength of hair and fibre comparisons, introduced for their *inclusionary* value. Ms. Nyznyk testified that the strongest conclusion that can be drawn is that a hair or fibre is *consistent with* having come from a particular source. The second strongest conclusion is that a hair or fibre *could have* come from a particular source. Either conclusion does not exclude the possibility that the hair or fibre came from a different source.

Another conclusion which is sometimes drawn is that a hair or fibre *cannot be excluded* as having come from the same source. Some regard this as a weaker conclusion than 'could have come from'; others use the two

² In *R. v. Terceira*, [1998] O.J. No. 428, the Court of Appeal used the term 'exclusionary,' in the context of DNA profiling, in a somewhat different way than has been used here. Here, evidence which is said to link the suspect/accused to the crime is tendered for inclusionary purposes; evidence which is said to eliminate the suspect/accused is relied upon for its exclusionary purposes. Finlayson J.A. states that the use of DNA as evidence that the suspect's DNA 'matches' the DNA found in the biology recovered at a crime scene serves an exclusionary purpose: "In the absence of further qualifications, a 'match' is no more than a failure to exclude a suspect's DNA from the crime scene." In DNA, probability statistics are then introduced in an attempt to bolster the significance of a 'match.'

³ This assumes that the condition of the examined hairs does not permit DNA typing. Some analysts believe that DNA typing does permit the expression of definitive conclusions, but it is unnecessary for me to decide this issue.

phrases synonymously. Still others use 'consistent with' and 'could have come from' synonymously. Some scientists use the term '*match*' to describe two similar fibres or hairs; others avoid this term. (This topic is addressed at some length later in this Report.)

In summary, scientists (within and outside the CFS) express the same conclusions in different terms; sometimes they express different conclusions using the same terms. Some of the terms, even if used uniformly, are potentially misleading. The term '*match*,' for instance, overstates the connection between similar hairs or fibres. The term 'consistent with' is interpreted by some to imply perfect or near identity of two items. The distinctions drawn by scientists are sometimes subtle and always important. However, due to the uneven use of language, as well as the inherent complexity of the subject matter, the scientists' findings (and their limitations) are easily miscommunicated and/or misapprehended by non-scientists. As I note below, both the miscommunication and misapprehension of scientific findings contributed to Guy Paul Morin's wrongful arrest and prosecution.

F. An Overview of the Hair Comparisons in *Morin*

(i) The Necklace Hair

When Christine Jessop's body was discovered, a single dark hair was found embedded in skin tissue adhering to her necklace. This came to be known as the 'necklace hair.' This hair was not Christine's and it was presumed to have come from her killer.

After Guy Paul Morin became a suspect, hair samples were obtained from him. Ms. Nyznyk testified at the second trial that the necklace hair was similar to Mr. Morin's hair samples and *could have* originated from him. She was unable to state that the hair was 'consistent with' having come from Mr. Morin because she could not make a full comparison: the root end of the necklace hair had atrophied and the bulb of the root had decomposed. As such, she was unable to make a root comparison. She was also unable to compare the tips of the different hairs. The necklace hair was six months old

by the time of her analysis,⁴ and Mr. Morin's hairs would have changed to some unknown extent over that period of time as they grew or were cut.

Mr. Erickson agreed with Ms. Nyznyk that the necklace hair was a 'could have' situation. In a letter to Mr. Scott, dated March 28, 1990, he wrote as follows:

It should be stressed that in order to have a complete and meaningful hair 'match', the following elements are normally required. 1. The unknown hairs should be complete hairs with roots. 2. There should be a one-to-one correspondence of major characteristics between the unknown hair and at least one hair from the comparison sample. 3. The comparison samples should be collected as near as practical to the date as the unknown is believed to have been shed. This minimises the chance that changes have occurred to the comparison sample, eg. length, changes to the tip end, cuticle damage, cosmetic alterations, et cetera. 4. No drastic changes should have occurred to the unknown hairs by accidental or environmental factors. *This is not to state that hair examinations cannot be useful as an investigative aid.* When the above elements are not present, however, the probative value of such an examination is minimised. The hair from the tissue B9 [the necklace hair] lacked a root, and had been exposed to environmental changes. The comparison samples had been collected several months after the disappearance of Christine Jessop, thus *the probative value of these hair comparisons are extremely limited.* (Emphasis added.)

Mr. Erickson explained in a subsequent letter to Elisabeth Widner (who acted with Jack Pinkofsky for Mr. Morin at the second trial) that there was no one-to-one correspondence of the major characteristics between the necklace hair and any one of Mr. Morin's samples, and that while the hairs shared some similar microscopic characteristics, only the necklace hair had

⁴ Christine Jessop disappeared on October 3, 1984. Her body was not discovered until December 31, 1984, and her hairs were not compared with Mr. Morin's until April 1985 or later.

a bleached appearance at its tip.⁵

Mr. Erickson testified before the Inquiry that although the necklace hair could have come from Mr. Morin, it could also have come from any number of other people, male or female. Indeed, prior to the second trial, Mr. Erickson had examined hair samples from 32 of Christine Jessop's classmates. The necklace hair could have come from two of them as well.⁶ He confirmed in his trial evidence that the value of this comparison was "extremely limited."

(ii) The Car Hairs

Ms. Nyznyk testified at the second trial that three hairs found in Mr. Morin's car (the 'car hairs') were dissimilar to Mr. Morin's hairs, and could have come from Christine Jessop. As with the necklace hair, the car hairs had deteriorated over time and she was, therefore, unable to state that they were 'consistent with' Christine's hairs. They could have come from one person or from three different people. Mr. Erickson also testified that the car hairs could have originated from Christine Jessop. He would not "go to the wall" with these comparisons because he did not think there were enough characteristics to be very strong in terms of his conclusions.

(iii) Findings

Mr. Erickson's trial testimony fairly presented the hair comparison evidence and its limitations. Mr. Pinkofsky was able to use Mr. Erickson's concession, reflected in his letters referred to above, to extract a similar concession from Ms. Nyznyk as to the extremely limited value of the necklace hair comparison. This concession might otherwise not have been forthcoming (to the same extent, at least) from her.

Although the limitations of the hair comparison evidence were generally communicated by Ms. Nyznyk at the second trial, I find that (1) she

⁵ Mr. Erickson explained that this could have been due to exposure to environmental conditions. This became a contentious issue at the second trial.

⁶ The evidence as to why the classmates' hairs had not been examined by Ms. Nyznyk is addressed below.

did not adequately or accurately communicate these limitations to police and prosecutors prior to the second trial; (2) had these limitations been adequately communicated, Mr. Morin may not have been arrested when he was — if, indeed, ever; (3) the hair comparison evidence was misused by the prosecution in its closing address (though I do not find that this was done malevolently).

The evidence bearing upon these (and related) findings is summarized below.

The introduction of evidence that hairs ‘could have come from’ Guy Paul Morin or Christine Jessop also raises an important systemic issue: does the probative value of such evidence, even if viewed as a piece of circumstantial evidence to be evaluated cumulatively, truly outweigh its prejudicial effect and justify its reception in support of guilt. Although our subsequently acquired knowledge that these hairs did not originate from Guy Paul Morin or Christine Jessop cannot dictate the answer to this question, the dangers associated with this evidence are surely highlighted by that known fact.

G. An Overview of the Fibre Comparisons in *Morin*

(i) The Conclusions Drawn by Ms. Nyznyk and Mr. Erickson

Fibres were collected from the taping of Christine Jessop’s clothing and recorder bag found at the body site, from the taping and vacuuming of the Morin Honda and from tapings of the Morin residence. Many thousands of fibres (perhaps hundreds of thousands) were examined. Several became significant. All of them were extraneous fibres, and no source was ever identified for any of them. As such, Ms. Nyznyk and Mr. Erickson could only conclude that the compared fibres were similar and *could have* come from the same source.

Ms. Nyznyk concluded that:

1. A pink/red animal hair fibre found on a taping from the front floor of the Honda could have come from the same source as a fibre removed from one of Christine’s socks and a fibre

found on a taping of her right shoe;

2. A purple/pink animal hair fibre found on a taping of the rear floor of the Honda, and a purple/pink rabbit guard hair⁷ fibre found in a vacuuming from the same vehicle could have come from the same source as a fibre removed from the waistband of Christine's corduroy pants and a fibre found on her sweatshirt;
3. A pink polyester fibre found on a taping of the gold seat cover in the rear of the Honda could have come from the same source as a fibre found on Christine's recorder pouch;
4. A dark grey animal hair found on a taping of the Morin living room rug could have come from the same source as two fibres found on tapings of Christine's turtleneck sweater.

Mr. Erickson was of the view that only one fibre collected from Christine Jessop's turtleneck sweater was similar to the dark grey animal hair collected from the Morin living room rug; otherwise, he agreed with these comparisons.

At the second trial, much time and effort was expended by the defence, through cross-examination of the Centre's experts and through its own expert evidence, to find out whether all of these compared fibres were true similarities. For example, the accuracy of the MSP graphs (as well as the conclusions drawn from them) was contested. In my view, the fibre comparisons were vulnerable for a more important reason: the similarities, *even if they all existed*, proved nothing.

Fibre similarities, assuming they exist, may be explained in different ways: (1) they may be random — that is, it may be (and often is) mere coincidence that several similar fibres are found in different locations; (2) the number of similar fibres, particularly where some or all are unusual, may be evidence of direct contact, and that, of course, was the position of the prosecution; (3) they may be evidence of a shared environment — fibres transferred without direct contact between the persons or objects on which

⁷ Guard hairs are an animal's outermost hairs.

the fibres are located ('environmental contamination'); (4) they may be explained by contamination during the collection, examination or storage of trace evidence ('contamination'). In this case, the fibre similarities did *not* favour the theory of direct contact.

(ii) Findings

Despite Ms. Nyznyk's evidence to the contrary at the Inquiry, I find that the clear thrust of her testimony at both trials was that these fibre similarities were likely evidence of direct contact between Christine Jessop and Guy Paul Morin. She minimized the likelihood that the similarities could be explained by random occurrence or environmental contamination. She never admitted (though given an opportunity to do so when the topic was explored by the defence) that internal contamination at the CFS could also possibly explain these similarities. Again, despite her evidence at the Inquiry, I find that she advised police and prosecutors that these fibre similarities were truly significant in placing Christine Jessop with Guy Paul Morin and that they were not 'neutral' or insignificant to the prosecution's case. Mr. Erickson's trial testimony also conveyed his opinion that these fibre similarities, though not conclusive, were significant to the prosecution's case. Mr. Erickson never disclosed that internal contamination at the Centre could possibly explain these similarities.

The thrust of their evidence is accurately summarized at paragraphs 106, 107 and 139 of the factum submitted by the Attorney General of Ontario in Mr. Morin's appeal against his conviction. They read:

106. Based on [the hair and fibre matches] it was Ms. Nyznyk's opinion that:

(a) Finding similar fibre types in the Appellant's car and in his home was significant since it demonstrated that there was transference of fibres between the home and the car;

(b) Finding similarities between fibres on Christine Jessop's clothing and the Morin living room rug was significant as it showed another instance of transference of fibres;

(c) With respect to finding several hair and fibre matches, as opposed to just one, Ms. Nyznyk stated:

If you found just one or two matches, then you would have to, you maybe have to consider the fact that it could have been be a random match, that it just happened to be that those fibres were there. The more matches you have, the less the chance, the less the possibility of having a random match of something just happening to be there and matching.

107. Mr. Erickson agreed with Ms. Nyznyk, stating:

Of course the more matches that you find, be it with hairs, fibres, paints, glass, the less chance there is of a random occurrence or a happening.

Well, if they just have come here randomly, there's less chance of that occurring. They still could be there, it's possible that they were there through a random occurrence but it diminishes with the more matches that you have. (References omitted)

.....

139. Ms. Nyznyk concluded her evidence by stating that, given the number of hair and fibre matches in this case, while it's possible, it's highly unlikely that they were all due to contamination. (References omitted.)

I find that (1) the fibre evidence was contaminated within the Centre of Forensic Sciences and this contamination might or might not have tainted any findings respecting fibre similarities; (2) this contamination was known to Ms. Nyznyk and Mr. Erickson prior to the first trial and withheld by them from the police, the prosecution, the Court and the defence at both the first and second trials; (3) further examination on already contaminated fibres was ordered by Mr. Erickson for possible use at the second trial; though no additional incriminating findings were used, certain findings which assisted the defence and undermined the prosecution were not communicated to the prosecution or the defence; (4) apart from the contamination at the Centre, the fibre similarities were not probative in demonstrating direct contact between Christine Jessop and Guy Paul Morin — instead, they were equally explainable by random occurrence or environmental contamination; the

number and nature of the fibre similarities did not support the prosecution's position; (5) Ms. Nyznyk and Mr. Erickson failed to communicate accurately or adequately the limitations on their findings to the police, the prosecutors and the Court; (6) Mr. Erickson (and likely Ms. Nyznyk) provided the prosecution with a published study on fibre transference (the Jackson and Cook study), which did not support an inference that the fibre findings in the Morin case were significant; (7) Mr. Erickson and Ms. Nyznyk failed to accurately or adequately communicate the limited relevance, if any, of the study to the prosecutors or to the Court; (8) the fibre findings and, more particularly, the Jackson and Cook study, were misused by the prosecution in its closing address (though I do not find that this was done malevolently); (9) this misuse was compounded by the defence's approach to this evidence. The evidence bearing upon these findings is summarized below.

The introduction of evidence that fibres 'could have come from' Guy Paul Morin or Christine Jessop raises an issue similar to that generated by the hair comparisons: does the probative value of such evidence, even if viewed as a piece of circumstantial evidence to be evaluated cumulatively, truly outweigh its prejudicial effect and justify its reception in support of guilt. Though our subsequently acquired knowledge that Guy Paul Morin was not in direct contact with Christine Jessop and that the fibre similarities were, in reality, insignificant cannot dictate the answer to this question, the dangers associated with this evidence are surely highlighted by those known facts.

H. Ms. Nyznyk's Early Communications with the Police

(i) The Necklace Hair

Detective Fitzpatrick and Inspector Shephard testified that on April 11, 1985, they brought 15 samples of Mr. Morin's hair to Ms. Nyznyk at the CFS. While they were there, she compared the samples to the necklace hair and advised the officers that they were *consistent with* having originated from the same source. She told them that she compared the root end, mid-portion and tip end of the hairs. She showed the officers the hairs under the microscope. Detective Fitzpatrick added that Ms. Nyznyk said her finding was confirmed by her assistant, Joanne, and that she would conduct further tests in order to verify her finding. Inspector Shephard, however, thought that Ms. Nyznyk did say that she could not be *certain* that the necklace hair was

Mr. Morin's.

Ms. Nyznyk's recollection of their meeting differed. She denied that she even compared the various hairs on April 11th. She explained that such an examination takes a great deal of time: the hairs have to be measured, mounted on glass slides, and left to dry before they can be examined. Accordingly, she found it hard to accept that she could have done all that in the two hours that the officers said they attended at the CFS. She estimated that it would have taken her a day or more. An English forensic scientist who gave evidence before the Inquiry, Roger Cook, testified that although one could mount a single hair and quickly look at it in two hours, a detailed examination would take much longer.

Ms. Nyznyk denied that she told Detective Fitzpatrick and Inspector Shephard that the necklace hair and Mr. Morin's hairs were consistent with having originated from the same source. The most she was ever able to say was that they *could have* come from the same source. But Inspector Shephard was confident that he never heard Ms. Nyznyk use the term 'could have.' Detective Fitzpatrick interpreted 'consistent with' to mean that the hairs matched (and came from the same person). Inspector Shephard said that Ms. Nyznyk never used the term 'match,' and Detective Fitzpatrick agreed that that was probably so. At the same time, he stated that Ms. Nyznyk appeared to understand how he was interpreting her results.

Ms. Nyznyk testified that she would not have told the officers that the hairs were consistent because the root of the necklace hair had atrophied and the tip was tapered. She may have said that she compared the root *end*, mid-portion and tip *end*, but she would have told the officers of the difficulties with comparing the actual roots and tips. Mr. Erickson testified that lay people might not recognize the distinction between terms like 'tip' and 'tip end' until it is explained to them.⁸ Ms. Nyznyk agreed. She did not know if she explained the distinction to Fitzpatrick and Shephard, but she did show them a chart of the different areas of a hair. Detective Fitzpatrick testified that he was somewhat familiar with the terms root end, mid-section and tip end,

⁸ The tip is the actual end of the hair. The tip end is the portion of the hair above the tip. I find that Ms. Nyznyk did not adequately communicate the distinction between the tip and the tip end, or the root and the root end, to the officers and that it was unreasonable to assume that the distinction could be drawn by the officers without adequate explanation by a scientist.

and that he understood that the strength of a comparison would be diminished if these areas had deteriorated.

Ms. Nyznyk also said that she may have told the officers that the hairs *matched* in certain areas; she used this term in her evidence at the first trial. Douglas Lucas, a former Director of the CFS, testified that police officers might become confused over the distinction between the terms 'match' and 'could have.'

Ms. Nyznyk conceded that she may have told the officers that the necklace hair and Mr. Morin's hair appeared to be macroscopically similar, an opinion which she acknowledged to be essentially meaningless. Detective Fitzpatrick testified that he thought macroscopic and microscopic meant the same thing.

(ii) Other Information Communicated to the Police

Detective Fitzpatrick wrote a supplementary report dated May 31, 1985, about their meeting with Ms. Nyznyk on April 11th. In addition to the information about the necklace hair, the report reflects that Ms. Nyznyk said that a hair located in the Morin Honda could not be ruled out as coming from Christine Jessop, that red plastic chips were found in the Honda and on Ms. Jessop's socks and panties, and that the same dyed red animal hair was located on Christine Jessop's shoes and socks and in the car. Detective Fitzpatrick testified before the Inquiry that Ms. Nyznyk said she had determined that the red animal hairs were from the same source. He also indicated that Ms. Nyznyk said the plastic chips were consistent with coming from the same source.

Ms. Nyznyk testified that she would not have said that the animal hairs were from the same source or were identical. The most that she could have said was that they *could have* come from the same source, given that the source for all of the fibres was unknown. Ms. Nyznyk further testified that she would not have made any comment about the plastic chips, since she was not responsible for their analysis — the CFS chemists were.

Inspector Shephard swore in his application for a warrant to search the Honda that Ms. Nyznyk had said that goldish-beige fibres found on Christine Jessop's body were consistent with the type of fibres used in upholstery and floor coverings for cars. Ms. Nyznyk testified that it was not possible that she

had said that.

Detective Fitzpatrick swore an affidavit relating to the Crown's appeal from Mr. Morin's acquittal at the first trial. In it, he stated that Ms. Nyznyk said that as a result of her findings, she was satisfied that Christine had been in the Honda; Detective Fitzpatrick testified before me that Ms. Nyznyk said that in 1985, Inspector Shephard testified on a pre-trial motion before the second trial that Ms. Nyznyk had formed the opinion that there had been contact between Christine Jessop and Mr. Morin. Ms. Nyznyk testified before the Inquiry that she said neither of these things.

(iii) Miscommunication vs. Misperception

Ms. Nyznyk was asked whether Detective Fitzpatrick's and Inspector Shephard's confusion over her findings could have been due to miscommunication on her part, rather than misperception on theirs. She did not think so. With respect, I disagree.

Ms. Nyznyk ultimately conceded that she had very little detailed recollection of her meetings with Detective Fitzpatrick and Inspector Shephard. Her evidence about what she did or did not say on April 11, 1985 was based on what she normally would have said, and not from any memory of the event. She ultimately admitted that she could not say for certain that the necklace hair comparison was not conducted on April 11th (although she doubted it was). She could not recall if she expressed a preliminary opinion about it. Ms. Nyznyk did not make a record of the content of her conversations with the officers. She agreed that such conversations should be recorded. Mr. Lucas felt similarly. Although the quality of Detective Fitzpatrick's and Inspector Shephard's notes are sorely lacking in other areas, their notes of the April 11th meeting, and their related supplementary reports, largely support their recollection of the encounter with Ms. Nyznyk.

(iv) Findings

I accept the officers' evidence where it differs from the evidence of Ms. Nyznyk. Indeed, I generally find Ms. Nyznyk's evidence to be unreliable. She repeatedly minimized her own role in implicating Mr. Morin, effectively blaming police and prosecutors for their failure to understand the limitations which she placed upon her evidence. At one point, she suggested that Mr.

Scott had pressured her to make her evidence stronger; later, in re-examination, she resiled from this position, and claimed that she did not appreciate that she had indeed implicated him. She repeatedly claimed that she had expressed to police, prosecutors and the Court that her evidence did little or nothing to support Mr. Morin's guilt. Ultimately, the overwhelming evidence to the contrary at this Inquiry compelled her to admit that she may have overstated her conclusions to police, prosecutors and the Court and thereby contributed to their misunderstanding. Unfortunately, I am unable to place any weight on her unsupported evidence where it differs from the evidence of others.

I find that Ms. Nyznyk did conduct a hasty, preliminary comparison of the necklace hair and Guy Paul Morin's hairs in the officers' presence. She did communicate a preliminary opinion to the officers. That opinion, however, was overstated and, to her knowledge, left the officers with the understanding that the comparison yielded important evidence implicating Mr. Morin. There is no credible evidence that the officers or Mr. Scott pressured Ms. Nyznyk to express stronger opinions. There is no doubt that the officers did repeatedly contact her by telephone or in person to produce her results more quickly. Mr. Scott also sought to have her produce more timely results. This was, perhaps, less than helpful, and at times counterproductive.

The time constraints on scientists at the CFS remain a systemic concern which I later address. However, I am not prepared to criticize either the officers or Mr. Scott in this regard. Their concerns were legitimate and their actions did not cross any line of inappropriateness. But Ms. Nyznyk crossed that line. Early in the investigation, she lost her objectivity; rather than remaining neutral and dispassionate, she acted in a manner favouring the objectives of the prosecution. She also had an inadequate understanding of the limitations upon her own science. It is, therefore, not surprising that she failed to adequately and accurately communicate the findings which could properly be drawn from the evidence, as well as the limitations upon those findings. It is also not surprising that officers focussing on Mr. Morin would understand her findings to be significantly incriminating of Mr. Morin and act upon them. I also believe that Ms. Nyznyk privately expressed to Detective Fitzpatrick and Inspector Shephard her own view that Christine Jessop had been in the Morin Honda. She may have been carried away by her importance to the investigation.

Apart from any inadequacies in Ms. Nyznyk's communication of her findings, the oral communication of complicated and subtle findings and, more important, the limitations upon those findings, may lead to gross misunderstanding. The recipients of the information (like the investigators here), whose attitudes are no doubt coloured by their own preconceptions, may well misinterpret the scientist's opinions, even if accurately expressed. *Inadequately expressed oral opinions and their limitations make it even easier for the listeners to hear what they want to hear.*

(v) Reliance on Communications

Inspector Shephard testified that Ms. Nyznyk's 'finding' of April 11, 1985, convinced him that Mr. Morin had committed the murder. Detective Fitzpatrick testified that Ms. Nyznyk's evidence was probably the most significant information supporting his belief that Mr. Morin was guilty. He stated that the necklace hair finding made Mr. Morin the prime suspect in the case. He added that the findings with respect to the car hairs, the red animal hair fibres and the red plastic chips led him to believe that Christine Jessop had been in the Honda. Both officers testified that Ms. Nyznyk's opinions played an important part in the decision to effect Mr. Morin's arrest. It also contributed to the grounds for a warrant to search his home.⁹

At this Inquiry, Ms. Nyznyk expressed concern with the officers' position that the decision to arrest Mr. Morin was prompted — in large measure, at least — by her finding with respect to the necklace hair. She explained that by April 22, 1985 (the date Mr. Morin was arrested) she did not really have any findings, except that the necklace hair *could have* come from Mr. Morin. That was not a conclusive result. She could not recall if the police advised her that they would be taking further action based upon the information she conveyed on April 11th. She admitted that she knew that the police were giving her evidence more weight than they should have, but she claimed that she was unaware of the extent to which they were doing so. There is no evidence that she expressed any concern in this regard to the police or to the prosecutors.

Detective Fitzpatrick also relied upon Ms. Nyznyk's oral

⁹ Mr. Scott similarly testified to how significantly Ms. Nyznyk's information contributed to Mr. Morin's arrest and prosecution.

communication of her findings in his testimony at Mr. Morin's bail hearing, conducted on June 17, 1985.

He told the Court that Ms. Nyznyk had concluded that the necklace hair and samples of Mr. Morin's head hairs were *consistent with* coming from the same source. He said that three different areas of the hairs had been compared (the root end, the mid-section and the tip end) and that all three were *consistent with* being from the same source. When asked by the Crown whether this similarity could happen randomly or whether it was a very significant piece of evidence, he told the court that it was a very significant piece of evidence. He added that Ms. Nyznyk had a lot more testing to do on the hairs.

Ms. Nyznyk told the Inquiry that Detective Fitzpatrick had not accurately described her finding in relation to the necklace hair. She had *not* concluded that the hair was *consistent with* having come from the same source as Mr. Morin's hairs, but rather that it *could have* come from the same source — a weaker opinion. She did not feel that the necklace hair was a very significant piece of evidence but, on the contrary, a fairly weak one. She also had no further tests to conduct on the necklace hair. Her opinion was already as high as it was ever going to get.

Detective Fitzpatrick also testified at the bail hearing that Ms. Nyznyk had compared a hair found in Mr. Morin's car with a hair found on Christine Jessop's body and concluded that they could not be ruled out as coming from the same source. He added that Ms. Nyznyk could not conclude that the hairs were consistent with coming from the same source because the hair roots had atrophied over time. Ms. Nyznyk testified before the Commission that Detective Fitzpatrick's evidence was accurate with respect to the strength of her finding, but misleading to the extent that it indirectly put the necklace hair in a better category than the other hairs. The problem of an atrophied root applied similarly to the necklace hair.

As for fibre evidence, Detective Fitzpatrick testified at the bail hearing that Ms. Nyznyk had concluded that dyed red animal hairs found on Christine Jessop and on the front floor of the Morin Honda were from the same source. He agreed with the suggestion that there was 'a similarity to or an identical match between' the animal hairs. Ms. Nyznyk testified before the Commission that the most she was able to say was that the animal hairs *could have* come from the same source. She could not state that they actually were

from the same source, and certainly could not say they were identical.

The last piece of forensic evidence which Detective Fitzpatrick brought to the Court's attention at the bail hearing concerned the red plastic chips found on Christine Jessop's clothing. He stated that a 'similar-type' chip had been found in Mr. Morin's car, and that the CFS had concluded that they were consistent with having come from the same source. He added that further chemical testing had to be done to determine the exact source. Ms. Nyznyk testified before the Commission that she made no findings about the plastic chips. The issue was to be decided by chemists at the CFS, not the forensic biologists.

Mr. Justice John Holland, who presided at the bail hearing, appeared to appreciate, to a greater extent than Detective Fitzpatrick, the intrinsic limitations on this kind of evidence. However, he would have no way of knowing just how insignificant Ms. Nyznyk's true findings were at that point. Some aspects of Fitzpatrick's evidence may have resulted, in part, from his own misapprehension of what Ms. Nyznyk told him. However, his evidence was not deliberately misleading and is explained, in large measure, by the inadequate way Ms. Nyznyk's findings (and their limitations) were communicated by her. My recommendations later address the miscommunication and misapprehension of forensic opinions.

I. The True Significance of the Comparisons

(i) The Forensic Opinions at this Inquiry

I summarized above the inadequacies in the way Ms. Nyznyk communicated her early findings to the investigators. The evidence discloses that Ms. Nyznyk and Mr. Erickson also failed to adequately communicate the limitations upon their findings (specifically, in relation to their fibre comparisons) to the prosecutors and to the Court. This conclusion requires an examination of the true significance of the hair and fibre comparisons to the case against Guy Paul Morin, in contradistinction to how this evidence was conveyed to the prosecutors and to the Court.

At this Inquiry, Ms. Nyznyk admitted that her findings in Mr. Morin's case were not of great significance:

A. ...The [fibre] findings would be either there was direct contact, secondary contact or tertiary. I wouldn't be able to say one way or another whether it was — what type of contact it was.

.....

Q. So that, would it be fair to say that adopting what you've said, the findings in the Applicant's case can be readily explained by coincidental fibre matches. The Applicant and the deceased living in the same environment. Some of the actions of the police during their investigation, or primary contact.

A. Yes, I would have to add that...

Q. Any one of those.

A. Any one of those ... There would be — *each one would be as equally probable as the other.*

.....

Q. *[I]s it your evidence that you never intended to communicate to the jury that you thought that your fibre findings supported the position that there had been primary transfer between Christine Jessop and Guy Paul Morin?*

A. *That my findings didn't support that?*

Q. *Yeah.*

A. *Yes, I agree with that. They did not support that.*

.....

Q. And, when it comes to the fibre evidence — and this goes back to your evidence yesterday morning, you testified yesterday that, in your opinion, your findings with respect to fibres, did not demonstrate that — or lead to the conclusion, that Christine Jessop had ever been in Mr. Morin's Honda. Is that right?

A. That was one of the conclusions possible, but it didn't necessarily lead to that.

Q. I don't know what that means. Does that mean it was just — I mean, it's always possible, everything's possible. Are you telling us that your evidence really didn't advance the cause one way or the other? That's how I understood what you were saying.

A. That's correct.

Q. So, in a sense, then, if one wanted to show that Christine Jessop had ever been in the Morin Honda, effectively, from the Crown's perspective, they'd better find evidence other than yours, because yours didn't help. Is that right?

A. That's correct. It wasn't strong enough for that. (Emphasis added.)

Ms. Nyznyk similarly downplayed the significance of her hair findings:

Q. I want to now just talk briefly about your actual hair findings, and your evidence was that in your view, the hair findings, that is, the necklace hair finding, and the Honda hairs findings were of very, very limited value, evidenciary (sic) value in terms of establishing a relationship between Christine Jessop and Guy Paul Morin; is that right?

A. As I say, they were all could-have situations, yes.

Q. Right. But as I understand it, it went a lot further than that. These were really weak comparisons within the context of a hair comparison. Is that right?

A. That's correct.

.....

Q. Looking at the Honda hairs, madam, which you also have expressed here, the findings of comparison, so-called, weren't worth a whole lot; right? I'm sort of colloquializing the way you presented it here. Is that fair?

A. There is still — they weren't again, it was a could-

have situation. I could not exclude them.

Q. And it was a kind of a weak could-have?

A. But it's a weak — yes.

Ms. Nyznyk agreed with Mr. Erickson's opinion, expressed in his March 28, 1990 letter to Mr. Scott (quoted above), that the probative value of the necklace hair was extremely limited. *She testified that, overall, she found nothing to prove a primary transfer between Christine Jessop and Mr. Morin.*

Mr. Erickson agreed at the Inquiry that the hair and fibre evidence did not prove contact. He testified as follows with respect to the fibre evidence:

Q. [A]m I right that the similarities between the fibres in the Morin environment and the body site environment did not compel the conclusion that a transfer had taken place. Am I right?

A. A contact, is that what you're saying?

Q. A contact, that's right.

A. I wouldn't draw that conclusion, no.

.....

Q. [Y]our position, the more similarities between fibres, the more likely there was contact in itself, it is not of a whole lot of assistance to a jury, unless they have some idea as to what kind of numbers they are going to take it from one likelihood to another. Would you agree with that?

A. Yes, the number that you find in order to establish contact should be quite high.

Q. All right, and of course, all you had in this case was five. Is that quite high? Is it?

A. No, in my estimation, it is not.

.....

Q. All right. Well, based on the information provided to you, we've heard from Ms. Nyznyk that it's her view, and she testified here several days ago that based upon everything that she had, the fibre evidence was equally consistent with primary transfer, namely Christine Jessop having been in the car, and with fibres being explained by the common environment, and with potential contamination, and with random occurrence. Do you agree or disagree with what she had to say about it?

A. Those were the possibilities that existed. Whether they were all equal, I don't know. We were provided with information, firstly, that Christine Jessop had not been in that car, secondly, there was no contact between Christine Jessop and Mr. Morin, and thirdly, the relationships between the two households, although they were in proximity to each other, there was very little social aspects to the two neighbours. So given that set of circumstances is a premise that we worked under. And as Ms. Nyznyk tried to explain, that had there been evidence to the effect that Christine Jessop had been in and out of that car, that there'd been evidence to the effect that there had been a lot of coming and going between the two families, then we probably wouldn't have undertaken that exercise to show that Christine Jessop could possibly be in that car.

As indicated above, Mr. Erickson thought that the probative value of the necklace hair was extremely limited. He testified before the Commission that, as a whole, the hair evidence in the Morin case was a weak 'could have' situation. He nevertheless felt that his evidence did assist the prosecution: the hair evidence did have some probative value; the necklace hair could incriminate Mr. Morin because he could not be eliminated as the donor. Mr. Crocker, another CFS analyst who testified at the Inquiry, disagreed that such evidence was incriminatory; it only indicated that Mr. Morin was a member of a class of indeterminate size.

Mr. Cook testified that the fibre findings in Mr. Morin's case were neutral. They assisted neither the prosecution nor the defence. They certainly did not help prove that Christine Jessop had or had not been in the Honda. He testified:

Q. Do you have an opinion as to the probative value,

or relevance, of [the fibre] matches I've just described to you in the evidence. Leaving aside — I know there are environmental factors come in here, if you can, leave them out of your opinion. Just looking at the numbers of fibres and colours, is there any probative value to prove that Christine Jessop was carried that Honda to her death?

A. I've got to take some account of what happened in the case, to give an answer to that. But, given the sort of examination that I understand took place in the case work situation, I think that these findings do not help prove that Christine was actually transported in that car.

Q. All right. And, there is, as we'll get to the evidence on, there is an environmental link which apparently may explain the matches?

A. That's my view, yes.

.....

Q. Well, do the fibre findings in the Morin case — and if you can leave the environment out of it for now, prove anything?

A. In my view, given the type of examination that was carried out here, that they could be just coincidental matches.

Q. Random deposits.

A. Exactly.

Q. And why is it your opinion that they, having regard to the facts of this case, in effect, they don't prove anything?

.....

A. What happened, my understanding of what happened in this case, was the extraneous fibre population, the fibres that were on the surface, if you like, of Christine's clothing, were compared with extraneous population of fibres, in other words, the surface fibres from the Honda, and also some surface

fibres found within the household of Mr. Morin.

And I think if you're doing an examination of that kind, where your comparing two populations of fibres, there is a strong chance that you're going to come across a few matches, even without the environmental influence. And I think the environmental influence is very important in this and no doubt we'll come to that.

Mr. Cook was later taken through some of the evidence indicating that the Morins and the Jessops, neighbours in Queensville, shared a common environment. He testified that the fibre findings "are explained as well by the shared environment as they are by [Christine Jessop] being [in] the car." This evidence is discussed further below.

Mr. Crocker testified that the fibre findings did not assist in proving that Christine Jessop had been in the Morins' car. Though he did not offer a definitive opinion, he felt that the findings were so weak as to be virtually useless, since the evidence was subject to several different interpretations, all of which were equally probable.

Mr. Crocker also had an opportunity to make a quick comparison between the necklace hair and Mr. Morin's hairs. He felt it was a very weak comparison. It was at the lowest level, *i.e.* the necklace hair could not be excluded as having come from Mr. Morin. Although there were similarities present, there were also definite differences between the hairs, including a colour difference on the tips of the hairs. Mr. Crocker testified that he had discussed his opinion with Mr. Erickson, and felt that they were "on the same wavelength with respect to [the] matching and non-matching characteristics."

There appeared to be substantial agreement among the forensic scientists who testified at the Inquiry as to the value of the hair and fibre comparisons in this case. Any differences seem to involve (1) whether a hair comparison which yields nothing more than a conclusion that the suspect cannot be excluded as the donor of an unknown hair can be characterized as 'incriminating' or not; (2) whether the fibre comparisons should even have been undertaken (even assuming no contamination within the CFS), given the shared environment in which the Jessops and Morins lived and other circumstances which potentially undermined the ability to draw any useful inferences from the fibre comparisons. (This latter issue is expanded upon below.)

(ii) Findings

I find that the necklace hair comparison, properly interpreted, yielded nothing more than a conclusion that Guy Paul Morin, together with countless others, could not be excluded as the donor of the necklace hair.

I find that the car hairs comparison, properly interpreted, yielded nothing more than a conclusion that Christine Jessop, together with countless others, could not be excluded as the donor of these hairs.

I find that the fibre comparisons, properly interpreted, yielded nothing more than a conclusion that the fibre similarities could be attributed to direct contact, environmental contamination or random occurrence. The comparisons did not favour the theory of direct contact over the other alternatives.

Indeed, it is arguable that the absence of certain fibre similarities supported the position of the defence that there was no direct contact. At the trial, there was an issue whether the absence of certain fibres (which one might have expected to find, had there been direct contact) was attributable to their dispersal over time and the non-shedability of certain fibres (as alleged by the prosecution) or, alternatively, tended to prove that there had been no contact between Christine Jessop and Guy Paul Morin. It is unnecessary for me to resolve the extent to which the absence of certain hair and fibre similarities supported Mr. Morin's defence. However, the way in which this issue was dealt with by the CFS was totally unsatisfactory. (This issue is elaborated upon in a later section of this Report.)

J. Advisability of Undertaking Fibre Examination

Apart from the true significance of the fibre comparison results, it has been suggested by some at this Inquiry that the fibre comparison work should never have been undertaken in the first place — that is, the circumstances known to the scientists pre-ordained that any comparisons were to be worthless.

Mr. Cook testified that the fibre examination performed in Mr. Morin's case was unusual, inappropriate and dangerous. He explained that

there are two common types of fibre examinations. The first involves searching for primary transfer from the non-extraneous fibres of a source item (e.g. searching the victim's clothing for fibres which make up a suspect's sweater). The second involves searching for primary transfer from the extraneous fibres found on a source item, *where very large numbers of a particular type of extraneous fibre are found on that item*. Neither of these examinations were employed in Mr. Morin's case. Instead, Ms. Nyznyk sought to compare *individual* fibres from one fibre population to *individual* fibres found in other fibre populations. Mr. Cook said that this type of examination is not done very often.

Mr. Cook would not have performed the examination conducted by Ms. Nyznyk. He felt it was dangerous to do so. In comparing two fibre populations, there is a strong chance of finding a few coincidental similar fibres. In addition, given that the Jessops and the Morins shared a common environment, it was inevitable that there would be a small measure of a shared fibre population. As such, the few fibre findings made by Ms. Nyznyk could be explained and, therefore, added nothing to the understanding of what may have happened in the case. Conducting the examination, however, imperilled the liberty of Mr. Morin.

Mr. Erickson testified that, in hindsight, he agreed with Mr. Cook's opinion on this issue, given the environmental links between the families.¹⁰

Ms. Nyznyk felt differently. She testified that it is not up to the scientist to decide that an examination should not be conducted because no evidentiary significance could ever be attributed to it. On the contrary, a scientist, she said, is obliged to examine every case, report on her findings, and let a court decide what significance the evidence should be given.

Mr. Cook, on the other hand felt it was part of a scientist's role to determine whether an examination would be worthwhile. Ms. Nyznyk acknowledged that there are times when she would not embark on a requested analysis (e.g. when it is clear that two people shared a common environment).

Mr. Crocker initially testified that he did not agree with Mr. Cook that

¹⁰ Mr. Erickson testified that he had been unaware at the time of the second trial of much of the evidence of a shared environment between the Jessops and the Morins. This position is later analyzed.

the examination should never have been done. (Indeed, he expressed this disagreement to Ms. MacLean during the course of Mr. Morin's appeal proceedings.) But he later clarified his evidence: while he would have conducted an examination to discover whether there were large numbers of similar extraneous fibres on an item, he would have abandoned further examination if he failed to find such a number.

As a non-scientist, I find it difficult to dictate when a fibre examination should or should not take place. However, I do not view the positions adopted by Mr. Crocker and Mr. Cook as irreconcilable. A forensic scientist should approach the situation with an appropriate understanding and respect for the limitations of the fibre comparison process. The scientist should inform himself or herself of the relevant background facts or hypotheses, appreciating that they may later change or be the subject of contested evidence. If the fibre examination will clearly be worthless because it cannot permit any reliable inferences to be drawn, it should not proceed. Only scientists — not investigators or counsel — can make that determination. Otherwise, the scientist can embark on a preliminary examination to assess whether the quantity and type of fibres available justify a full-fledged enterprise. Messrs. Cook, Crocker and Erickson all agreed (Cook sooner than the others) that the *Morin* investigation should not have engaged in that full-fledged fibre examination.

K. The CFS Evidence at Trial

(i) The First Trial

As indicated above, Ms. Nyznyk testified for the prosecution at the first trial. Any of the difficulties with her testimony at this trial can more usefully be addressed when her testimony at the second trial is reviewed. Of significance here is the fact that Mr. Erickson, her supervisor, read a transcript of her first trial testimony before he gave evidence at the second trial. *He thought that her findings were given more emphasis (by her) than they warranted.* For example, he interpreted her evidence to be that the hairs were 'consistent with' when she should only have said they 'could have come from' the same source. He felt her evidence might have been perceived to be stronger than it was.

Given Mr. Morin's acquittal at the first trial, I do not propose to resolve the issue of whether Mr. Erickson's perception of Ms. Nyznyk's testimony was accurate. However, any action or inaction that he, as a section head, demonstrated in response to his perception that her findings were 'overemphasized' invites comment.

Mr. Erickson said he spoke to Ms. Nyznyk about the problems with her testimony, but did nothing to correct any misperception held by the defence (or Crown) because Mr. Morin had been acquitted. He testified:

Q. All right. So why should the defence know for the purposes of the second trial? Is that your attitude?

A. No. We just don't do it.

Q. You just don't do it? And yet you present yourself, sir, as a balanced organisation with balanced employees who favour neither the Crown nor the defence?

A. That's my position.

There is no suggestion that Mr. Erickson recorded his concerns in any case file, in any personnel file or anywhere else.

Mr. Cook testified that if he thought a junior examiner had misrepresented her evidence in a case he would convey his opinion to the relevant counsel.

Mr. Erickson should have done so as well. I appreciate that it is difficult to reflect upon a colleague in this way. However, Mr. Erickson was the section head of biology and Ms. Nyznyk's supervisor. Meaningful supervision brings with it responsibility — particularly where potentially misleading or inaccurate evidence is given at a murder trial. In fairness to Mr. Erickson, he partially addressed the problem by specifically setting out the great limitations upon the hair comparison evidence in his letter to Mr. Scott.

(ii) The Second Trial

The tenor of Ms. Nyznyk's evidence at the second trial has been earlier noted. Unlike the cross-examination conducted at the first trial, the

cross-examination by Mr. Pinkofsky at the second trial was very lengthy and implicated Ms. Nyznyk's expertise, skill and qualifications, and not merely the inferences that could be drawn from the hair and fibre similarities and whether these were really similarities at all. For example, Ms. Nyznyk was cross-examined on the presence of 'looped cuticles' in the examined hairs; as noted in the Centre's written submissions, "she should have understood the meaning of 'looped cuticles' in hair analysis." Many of the points made by Mr. Pinkofsky could have been well taken. Unfortunately, the lengthy cross-examination may also have led the jury to believe that the comparisons demonstrated more than even Ms. Nyznyk claimed they did.

At the end of her examination-in-chief by Ms. MacLean, Ms. Nyznyk said this:

Q. Is there any significance that can be attached to the conclusions or any significance to the conclusions that can be drawn by the fact that several hair and fibre matches are found as opposed to finding just one?

A. Yes. If you found just one or two matches, then you would have to, you maybe have to consider the fact that it could have been a random match, that it just happened to be that those fibres were there. The more matches you have, the less the chance, the less the possibility of having a random match of something just happening to be there and matching.

Ms. Nyznyk gave similar evidence in re-examination by Ms. MacLean:

Q. Now, you were asked about the probative value of that single hair. Is the probative value [of] conclusions one might draw any greater where you have two hairs, such as hair in a chain, and one in the car?

A. The same conclusions would be reached, that I could not exclude.

Q. All right. And when we're talking probative value or the weight to be attached to the evidence, is the probative value any greater if you have hair in a chain, three hairs in a car, four or five fibres between the clothing and the car and the house?

A. Well, yes, the chance of a random match is greatly reduced in that case and the probative value, I would have to agree, the more matches would be — it would be greater.

Ms. Nyznyk testified before the Inquiry that, in giving this evidence, she was commenting on general principles and not on Mr. Morin's case. She did not interpret the questions as referring to the *Morin* case. But Ms. MacLean, who led Ms. Nyznyk's evidence, testified that the purpose of the questions was to elicit evidence applicable to Mr. Morin's case. She felt that the intent was obvious from the content of the questions, as well as from the fact that, in examination-in-chief at least, the relevant question followed a series of questions about Ms. Nyznyk's findings in the case. I agree with Ms. MacLean.

Ms. Nyznyk testified that she was content with her evidence that finding more than *two* matches diminishes the chance of a random match. She did not think that she had left a wrong impression with the jury, despite the fact that she did not believe that randomness was an explanation less likely than contact. She testified:

Q. Do you think, madam, that another way of saying what you just said there was: You got enough findings from me in this case that you can draw the conclusion that the findings are not findings of a random match?

A. Now, I've mentioned the word, it's a possibility that that can occur.

Q. Well, you don't. You say, "The more matches you have, the less the possibility of having a random match."

A. Yes, but the less the possibility, but still a possibility.

Q. And that's more than two. You say, "If you found just one or two ...? You have found significantly more than one or two; haven't you?"

A. Yes.

Q. So do you think, Ms. Nyznyk, that any normal citizen, and indeed, any normal lawyer, and any normal judge would conclude from what you said there, that the findings that you made in the Morin case should lead to the probable conclusion that Christine Jessop had been in the Morin Honda?

A. I don't think it should be taken — would have been taken on that statement.

Ms. Nyznyk acknowledged that, after giving her evidence about general principles, she did not add that her findings in the case had no real significance. She stated that it simply did not occur to her to mention that her findings were as consistent with randomness as contact. She ultimately agreed that the impression she left in her evidence was that, given the number of hair and fibre findings in the case, it was highly unlikely (although possible) that they were all due to coincidence. She admitted that it might have been wise to mention that she found nothing to prove primary transfer. (*With respect, this is an understatement of mammoth proportions.*) She swore that she had not intended to inform the jury otherwise. She accepted that she may have contributed to the erroneous view that her findings incriminated Mr. Morin.

Ms. Nyznyk added that sometimes her opinions are not conveyed properly in court because, as an expert, she can only answer the questions asked. She feared that she would be labelled an advocate if she expressed an opinion without being specifically asked for it. She explained that this was the reason why she did not tell the jury at the second trial that her evidence did not assist the Crown's case.

Mr. Cook testified that Ms. Nyznyk's evidence at the second trial was misleading because the findings did not demonstrate that Christine had been in the Honda, and could easily have been explained by other factors, such as environmental contamination (or random occurrence). He had some sympathy for Ms. Nyznyk's view that experts are not allowed to volunteer opinions, but felt that the likelihood of alternative explanations for the findings was so important that it should have been brought out in evidence. An expert, he said, must apply any general statement of principle to the case at bar or there will be room for misinterpretation. Mr. Cook also felt that Ms. MacLean's questions to Ms. Nyznyk were sufficiently open-ended to give Ms. Nyznyk the opportunity to say that her findings had no significance to the

case.

Mr. Lucas testified that an expert in court is essentially limited to answering the questions asked of her, and that it is sometimes hard to keep answers precise in the context of the particular questions asked. He also felt, however, that it was incumbent on an expert to make as clear as possible, within the limits of the adversary system, just what she considers the significance of the evidence to be.

(iii) Findings

I do not accept that Ms. Nyznyk's failure to volunteer that her evidence was neutral was motivated by her fear of becoming an advocate. On the contrary, this opinion was not forthcoming because, at the time, she did not believe that her findings were neutral. Her answers were intended to apply to Mr. Morin's case and were understandably taken by Ms. MacLean and the defence to so apply. The unequivocal impression left by her testimony — and intended to be left by her testimony — was that her findings were significant in proving direct contact between Christine Jessop and Guy Paul Morin and that random occurrence was a highly unlikely explanation for these findings. This was a serious overstatement of the significance of her hair and fibre findings, even if the accuracy of her laboratory work is assumed.

Having said that, this evidence does highlight a systemic issue raised at this and other Inquiries: what should the scientist's obligation be to correct potentially misleading or misunderstood scientific evidence? I later address this issue in my recommendations.

Mr. Erickson testified at the second trial that finding several matches decreased, but did not eliminate, the possibility of random occurrence. At this Inquiry, Mr. Erickson did not feel that the five fibre comparisons in Mr. Morin's case were enough to establish contact. Yet he did not advise the jury of this at the second trial. Mr. Cook testified that Mr. Erickson's opinion should have come out in evidence.

Mr. Erickson testified before the Inquiry that, while the animal hair fibres in Mr. Morin's case were distinctive, the number of findings with respect to those fibres was not high. He did not mention this opinion in his evidence at the second trial. He stated that he never considered doing so. He

accepted that his evidence may have come across a lot stronger than his actual opinion.

I find that the tenor of Mr. Erickson's testimony at the second trial was that the fibre findings provided significant support for the prosecution's theory of direct contact between Christine Jessop and Guy Paul Morin, though other possibilities did exist. I agree with Mr. Cook (and Mr. Erickson's present position) that the findings did not make the prosecution's theory more likely than random occurrence or environmental contamination. Mr. Erickson should have appreciated that the number and nature of the few fibres found, together with the background circumstances, did not support the tenor of his testimony. He did appreciate and articulate the severe limitations upon the inferences which could be drawn from the hair comparisons.

Ms. Nyznyk demonstrated a lack of scientific rigour or care in the expressions of her opinions, together with a loss of objectivity. Mr. Erickson demonstrated a lack of scientific rigour or care in the expressions of his opinions on fibre evidence. It may be that the inadequacies in his fibre-related evidence were not attributable to a loss of objectivity or impartiality. However, the issue of his partiality is later addressed in the context of the in-house contamination evidence and the work of another CFS employee, Shirley Stefak.

The inadequacies in Ms. Nyznyk and Mr. Erickson's testimony are more fully explored in the context of the prosecution's presentation of their evidence, particularly in Mr. McGuigan's closing address.

L. The Jury Address

(i) Cautionary Notes

Ms. MacLean prepared several drafts of the hair and fibre portion of Mr. McGuigan's address to the jury. Mr. McGuigan changed these drafts in several respects. It was alleged before me that aspects of the Crown's closing address dealing with the hair and fibre evidence were misleading or potentially misleading. The evidence supports that conclusion. However, I cannot find that this was deliberate. I outline those misleading aspects of Mr. McGuigan's closing address, not as a basis for a finding of misconduct, but

rather to explain how science came to be misused in this case and how such misuse might be prevented in the future.

In assessing the Crown's closing address, I am mindful of these cautionary notes: (1) Crown counsel are entitled to advocate, with vigour, their position throughout the trial and in their closing address; (2) Mr. McGuigan's closing address cannot be evaluated on the basis of Mr. Morin's subsequently proven innocence — no jury address could survive that kind of scrutiny; (3) Similarly, the closing address cannot be evaluated on the basis of what is now known about the lack of significance of the hair and fibre evidence. Mr. McGuigan was entitled to rely upon Ms. Nyznyk's and Mr. Erickson's opinions expressed back then (as opposed to now).

(ii) Random Occurrence and the Jackson & Cook Study

Overview

At the second trial, the prosecution led evidence, through Ms. Nyznyk and Mr. Erickson, of a 1986 published study entitled "The Significance of Fibres Found on Car Seats." This study was conducted by two English forensic scientists, Roger Cook and Graham Jackson. Mr. Erickson (likely together with Ms. Nyznyk) had provided the study to the prosecutors in preparation for the second trial. Mr. McGuigan referred extensively to the study in his closing address, heavily relying upon it as support for the prosecution's position that the fibre similarities showed direct contact between Christine Jessop and Guy Paul Morin. The study, properly understood, did not support the case for the prosecution. Further, the details of the study were completely irrelevant to the proceedings against Mr. Morin. The study was seriously misused at Mr. Morin's trial and likely misled the jury. The CFS scientists themselves did not adequately communicate the study's lack of significance to the prosecutors or to the Court. Accordingly, although the Crown's closing address, in some respects, took the study farther than anything that the scientists had said about it, I do not find that the study's misuse by the prosecution was deliberate.

The Nature and Purpose of the Study

Cook and Jackson undertook the study because cars were often being used to commit crimes in Great Britain. The study's purpose was to

determine the significance, if any, of finding particular fibres (which may be linked to a particular suspect) on the front seats of 'getaway' cars. Messrs. Cook and Jackson wanted to know how likely it was to find the fibres by chance and, conversely, how likely it was that finding such fibres indicated the suspect had been in the car.

Cook and Jackson employed the following methodology. They chose two very common fibres taken from two very common garments in the United Kingdom: red wool from a sweater and brown polyester from a pair of trousers. These were designated the 'target fibres.' They then searched for those fibres on the front seats of 108 cars owned by their colleagues at work, taking precautions to ensure that the sweater and trousers in question did not come into contact with any of the cars. They found 4,430 red fibres and 4,006 brown fibres in the cars. They compared these fibres with the target fibres, using a high powered comparison microscope, microspectrophotometry (MSP) and thin layer chromatography (TLC). In the end, they found 37 similar red fibres and eight similar brown fibres.

Mr. Cook testified that, in broad terms, all 45 similar fibres were there by random chance, since none of the cars had been in contact with the actual sweater or trousers from which the target fibres were taken. However, for 27 of the red fibres, primary contact appeared to be a likely explanation for their occurrence (though not primary contact with the sweaters which produced the target fibres). The 27 fibres were found in two cars (20 in one and seven in the other), and in each case a relative of the car's owner owned a garment made up of fibres which were exactly similar to those in the target sweater. During Mr. Morin's second trial, the remaining 10 red fibres were often referred to as the 'random fibres.'

The 10 'random' red fibres were distributed amongst six cars. One car had three, two others had two, and the remaining three cars had one fibre each. The eight brown fibres were distributed amongst five cars. One car had three, another had two, and the remaining three had one each. In only one car were brown and red fibres found (one of each).

The conclusion of the study was as follows: When significant numbers of more than one type or colour of matching fibre are found on a car seat, the evidence for contact appears to be highly significant. When a small number of fibres is found, which match a commonly occurring fibre colour and type, the possibility of a spurious random match or of a secondary

transfer must be taken into account.

Relevance of the Study to the *Morin* Case

Mr. Cook testified before the Inquiry that his study had no relevance to Mr. Morin's case. He further testified that he did not think the study should have been introduced in the case: the jury might have been led to believe that it was relevant and used it to conclude that the fibre findings in Mr. Morin's case were not random.

Mr. Crocker agreed with the opinion expressed by Mr. Cook. The study in no way paralleled the circumstances of the Morin case. Mr. Crocker felt that any expert would know just from reading the study's abstract that it could not be used as a parallel. He could not understand why evidence about it was adduced at Mr. Morin's trial.

Mr. Cook took serious issue with the relevance given to his study by Ms. Nyznyk and Mr. Erickson and the impression conveyed by their trial testimony. On the totality of the evidence, I find that the study's relevance to the Morin case was minimal, and that a very different impression was left by the expert testimony at trial. The problem was compounded by the prosecution's closing address to the jury. It therefore becomes necessary to examine the study (and the references to it in the closing address) more closely.

Distinctions Between the Study and the *Morin* Case

There were a number of distinctions between the study and Mr. Morin's case which are of importance, and the prosecution's closing address must be evaluated in light of these distinctions.

Number of Target Fibres

Mr. Cook testified that only two target fibres were used in the study, whereas 153 to 463 target fibres were used in the *Morin* case. In an affidavit prepared for Mr. Morin's appeal, Mr. Cook professed that this would have a profound effect on the results of any comparison:

If 154 to 463 target fibres had been used in the Jackson
& Cook Study there can be little doubt that:

- the number of matching fibres found would have increased;
- the number of front car seats upon which matching fibres were found would have increased; and
- the number of cars in which more than one type of matching fibre was found would have increased.

Simply put, as the number of target fibres one looks for increases, the more likely it is that coincidental 'matches'¹¹ will be found. The fact that the red animal hair fibres found in the *Morin* case were uncommon did not alter Mr. Cook's opinion. He noted that the greater number of target fibres, the greater the chances of finding some unusual matches.

Mr. Erickson questioned the basis for Mr. Cook's determination of the number of target fibres in the *Morin* investigation, but agreed with the point made:

Q. So you examined far more potential targets than Mr Cook examined?

A. Yes.

Q. Yes, all right. Which would tend to suggest, would it not, sir, that any attempted numbers game comparison between the Jackson & Cook study and what Nyznyk and you did is a fruitless exercise?

A. I would agree.

Q. Which is what Cook said; right?

A. Yes.¹²

¹¹ Elsewhere, I have noted the misuse of the term 'match.' It is used in this section of the Report because that is the term used both in the study and by Mr. Cook in his commentary. Mr. Cook made, however, the appropriate cautionary comments in relation to the term.

¹² Mr. Cook based those figures on the number of fibres removed from Christine Jessop's clothing (463) and the number of descriptive categories into which the fibres were placed by Ms. Nyznyk (154). Mr. Erickson testified that the 463 fibres were only potential targets, some of which would have been eliminated if they were found to be too common for

Mr. Crocker also agreed, but Ms. Nyznyk would not quite go that distance, although her point of departure was unclear to me:

A. Actually, I disagree with certain aspects of [what Mr. Cook says] ... First of all, Mr. Cook, he looked at 108 vehicles but he doesn't state that he, himself, removed from those vehicles, almost 8500 fibres, looking for just two types that he had a common source for. In this case, I removed fibres that were extraneous to her clothing as an investigative tool. Basically, it's very, very, different from his study.

Q. Well, I think with respect, that may be his point, that the comparison involved in his study raised very different kinds of issues when one looks at how the process began, than the comparisons that you were doing — and I take it, from what you've just said, you agree with that. Or do you?

A. The process, basically, is similar, but yet different. An investigative case is very different from a controlled study. His results, his conclusions — if you look at the number of automobiles he's looked at, the number of initial fibres, like he's saying that my target fibres were many. His target fibres — he knew his sources.

At this point in time I had no sources, so, essentially, the 463 fibres that I removed were not all target fibres as he calls them. He, himself, removed over 8500 fibres just looking for a red and a brown.

I was looking for anything that I could help with the investigation. Anything, as you said, extraneous fibres for this. So, essentially, we were doing the same — exactly the same kind of work by removing all those numbers of fibres. If he removed 8500, but he had a common source, he was looking just for reds and browns. At this point in time, I was removing fibres looking for anything.

Q. Well, I think that's his point, isn't it? That if he's only looking for two fibres and found a certain number, that you were looking for a much wider variety of

fibres that could match, and could therefore be expected to find more matches. I think that, as I understand it, is the point that he making. And, would you agree with that?

A. Not exactly, no.

I find that no inference whatsoever can be drawn from the fewer number of random similar fibres found in the study that the greater number of fibre 'matches' found in *Morin* were significant in proving direct contact.

However, this was the very inference which Mr. McGuigan asked the jury to draw from the Jackson and Cook numbers. A portion of his address is illustrative:

Mr. Erickson testified that the study indicated that taping of 108 vehicles was done, resulting in 8,436 fibres being removed for examination. Out of that number only 12 of the 108 cars were found to have either of the very common target fibres in them. Twelve out of 108. Out of those 12 cars and of the 8,436 fibres from all the cars, there were only 45 fibres in total, ... notwithstanding, as I said, these were common fibres, and only one car out of 108 was found to have both target fibre types.

Two common types of fibres, 108 vehicles, one car contained these two common fibres.

In terms of the red wool fibres, 4,435 which were examined in total, and 37 were found to be indistinguishable to the target red wool. The 37 fibres were found in only eight of the 108 cars. So 100 of the cars did not have any of the very common red wool fibres being looked for.

In one of the eight cars they found seven red wool fibres and in a second car they found 20 red wool fibres. In those two cases they went back to the people who owned the cars and found that these people owned the garments which were the direct sources of the red wool fibres. That is, they were examples of primary transfers.

With respect to the other six cars there were only 10 red wool fibres in total. Three of the cars only had one

fibre in them, two cars had two fibres and one car had three fibres, all of the same type of fibres.

The transfers in these cars were considered to be examples of secondary transfers, because they didn't find a source garment.

With respect to the very common brown polyester target fibre, 4,006 fibres in 108 vehicles were examined and out of all those fibres only eight were found of this brown polyester type. Only five of the 108 cars had fibres of this very common type.

So, of 108, only 12 had the very common fibres looked for, and only one of those cars had both the brown polyester and the red wool fibre. Of those 12 vehicles a source garment was determined in only two instances.

Now these people concluded, as a result of their study, that when you have large numbers of more than one type or colour of matching fibres, the evidence of contact appears to be significant. There is a higher likelihood of contact having occurred if there is a high number of colours and fibre types.

I submit, and I repeat to you, ladies and gentlemen, the results of this study are very significant to this case.

Absence of Environmental Links

There were no known environmental links in the study between the target fibres (taken from one red wool sweater and one pair of brown polyester trousers) and the cars being searched. Mr. Cook distinguished this from Mr. Morin's case where there were two known environmental links between the Morin and Jessop families: they were neighbours who had direct contact both before and after Christine Jessop's abduction, and the police had come into contact with both the items associated with Christine Jessop and the items associated with Mr. Morin. Mr. Cook suggested that it was inevitable that some shared fibres existed.

Ms. Nyznyk disagreed with this too. In her view, there *was* a shared environment in the study: all the cars that were examined belonged to employees working at Mr. Cook's laboratory. Fibres could have transferred between employees; therefore, some of the transferred fibres may have been

deposited into the cars that were examined. Ms. Nyznyk was questioned about this view:

Q. In his study, you've got two target fibres, right? And what he's suggesting is those target fibres that were taken from Marks & Spencer, had never been in contact with any of the people whose cars were involved on the other environment. Right?

A. Hmm-hmm.

.....

Q. And, what you're saying is that as between the cars, there was the possibility of contamination or transfer, right?

A. That's correct.

Q. But isn't his point that there is no possibility of a shared environment between the target fibres taken from Marks & Spencer and the 108 cars?

A. But he was comparing the target fibres to fibres randomly picked from these cars. So, essentially, those target fibres were his source. So, if one person — so his results, when it comes down to it, his results were, like, if one person sat in one car, went to work, sat down in another car, he can't explain the transfer of those fibres.

The target fibres, yes, they were never in contact with those cars. I agree with that. And the environmental factors, yes, I definitely agree with that, but I disagree with his facts saying that there were no known environmental links between his — in his study.

Q. All right. Well, leaving aside how one characterizes, because I think elsewhere he makes it clear that, indeed, there are the environmental links as between owners of cars and what have you. Would you agree that the absence of an environmental link between the two target fibres and the cars, is a significant difference between his study and the case in which you were involved?

.....

A. Again, you can't really compare it because there was no source fibre. There was no source for any of the fibre matches that I had.

Mr. Cook noted that any environmental link between the cars examined in the study was irrelevant because there was no environmental link between the cars and the target red wool and brown polyester fibres. It is a fallacy to say that the *Morin* case and the study are analogous because both have environmental contamination. (The environmental link between the study's cars is no different than the environmental link between the Morins within their household. The existence of that link does not advance the analysis.)

At this Inquiry, Mr. Erickson and Mr. Crocker understood that the analogy is a false one. Ms. Nyznyk did not.

Mr. McGuigan's closing address reflected Ms. Nyznyk's view:

The 108 vehicles were a random selection of cars belonging to the members of staff and friends at the home office, Forensic Science Laboratory. *A lot of them worked together so that even within that framework, there would be a possibility of contact.* (Emphasis added.)

The latter sentence was not included in the draft prepared by Ms. MacLean. Based upon Mr. McGuigan's and Ms. MacLean's evidence, I think it likely that Mr. McGuigan inserted this thought. (As will be noted below, a similar theme was developed during Mr. Erickson's trial evidence.)

Front Seats Only

The study looked for fibres only in the front seats of cars. In *Morin*, the Honda was taped and vacuumed throughout. Fibres were also removed from Mr. Morin's house, broadening the search area further. Mr. Cook testified that any comparison between the number of matches found in the *Morin* case and the number of matches found in the study is meaningless. How could one reasonably infer that the greater number of matches found in the Honda than the random matches found in the English cars supports the existence of direct contact when only the front seats of the English cars were examined? As Mr. Lockyer noted in his submissions, the fallacy is exposed

by asking oneself how many matches were found in the front seat of the Honda. The answer is none. Had the Jackson and Cook methodology been employed, the scientists would have reported that the Honda yielded no fibre matches.

In his closing address, Mr. McGuigan repeatedly invited the jury to draw an adverse inference against Mr. Morin from the very few random fibre matches found in any one of the English cars. This minimal number (compared with the *Morin* findings) was thought to support the prosecution's position that the fibre findings from the Honda were unlikely to be random. As Mr. Cook noted, it was "meaningless to invite a comparison between the number of matching fibres found in [Mr. Morin's] case and the number of matches found in any one car whose front seats had been examined in the Jackson & Cook study."

Mr. Erickson agreed with Mr. Cook's position on this issue. He also admitted that, at the time of the trial, he had not considered the fact that if Ms. Nyznyk had only examined the front seats of the Honda no similar fibres would have been found. He also agreed that it might have helped avoid a miscarriage of justice if he had.

Some of Ms. Nyznyk's testimony on this point was confusing. Ultimately, she did say this:

Q. Would it be a scientifically valid argument to make to a jury, that because the Jackson & Cook Study found, at most, three random fibres in the front seat of a car, it follows that there must be significance to the five fibres that Ms. Nyznyk found in this case. I mean, is that comparison a valid comparison?

A. I think the comparison would be valid to the point that you'd have to say that there are — the way that the fibres arrived there, or the secondary transfer, or whatever aspect of that. The more matches — matches, as you say, that you have, the more chance it is less of a random tertiary, say, contact. So, in a way, I would have to agree that it would be more significant to have more matches than less.

Q. All right. It would be more significant to have more matches rather than less. All right. I think I'm asking you something a little bit different, and that is,

could one take the numbers from the Jackson & Cook Study and say, because the numbers there were one, two, three, five fibres found, one can infer primary transfer from the existence of five fibres in the Guy Paul Morin case. You know, two more fibres, that means it's significant.

A. Not primary transfer.

The Thin Layer Chromatography Figures

The study identified 87 similar red wool fibres after completion of MSP testing. The authors then used thin layer chromatography to further reduce the number of similar red wool fibres to 37. Thin layer chromatography, a more discriminating test, was not used during the *Morin* investigation. It would, therefore, be misleading to rely on the TLC figures to demonstrate how few random fibre matches were identified in the study, making it more likely, by comparison, that the number of *Morin* fibre matches could not be random. Every witness at this Inquiry appeared to understand the fallacy inherent in this kind of submission.

In his closing address, Mr. McGuigan reviewed the study's findings, emphasizing that only 10 random red wool matches were found in 108 cars. The figure of 10 random matches, however, and indeed all the figures cited by Mr. McGuigan, were achieved *after* TLC. He did not refer to any of the figures found after MSP testing. He also did not remind the jury of the distinction between the MSP and TLC figures. Mr. Cook pointed out that if the Crown had referred to the appropriate MSP figures, the number of random matches would have been considerably higher (potentially making it appear not so unusual to find them).

Both Mr. Erickson and Ms. Nyznyk agreed with Mr. Cook on this issue. They also both accepted that if TLC had been employed in Mr. Morin's case, it might have reduced the number of fibre matches to zero.

Ms. MacLean wrote a draft of the portion of the jury address dealing with the Jackson and Cook study. It contains the following observations:

[Note: You may not want to use this paragraph:
Using the comparison microscope only, the scientists originally thought there were 192 similar red wool fibres, then using microspectrophotometry this was

reduced to 87 and then using thin layer chromatography (destructive test) this was reduced to 37 fibres of the red wool type.]

.....

[Note: You may not want to use this paragraph:

Using only the comparison microscope, only 11 brown fibres were found to be similar, then using the microspectrophotometer this was reduced to 8, and then using thin layer chromatography, no additional fibres were eliminated, i.e. still 8 found to be similar]

Mr. McGuigan chose not to use these paragraphs. Instead, he used only the final figures of the Jackson and Cook study, comparing those figures to the number of fibres found in the *Morin* investigation. Counsel for the Morins suggested that Ms. MacLean's draft and Mr. McGuigan's decision not to allude to the more appropriate figures for comparative purposes indicated a preconceived plan to mislead the jury about the study. Ms. MacLean denied that was the case:

A. No, I believe I've already testified to this earlier, what happened was, Mr. McGuigan was very concerned about the length of the parts of the closing I had written for him, and that was one of those areas where after viewing the draft, he said basically: Well, I don't know why we have to get into all this. The jury's heard all these details, more or less. He asked me to put a note to him so that he would be clued in, depending where he was in his closing, he would be clued into whether he wanted to use a paragraph or not depending on time constraints with his closing. So that note to him was put in at his request simply as a matter of time.

Q. You see, madam, that position might be credible, I'd suggest, if Mr. McGuigan had taken out, in the interests of saving time, all the figures that he spent some three pages relating in his closing from the Jackson and Cook study, if he hadn't read in how many vehicles there were, how many fibres there were, how many car seats there were, how many fibres were found in this car, in that car, and so on and so forth. If he'd left all that out, what you're saying might be credible, because then you've really got a shortening of the closing.

A. Well, if you read my draft compared to what he read on the second day, he edited large portions out. I can't tell you why Mr. McGuigan chose to leave some parts in and leave other parts out. You would have to ask him that, but he did edit out other portions at length.

Ms. MacLean further responded that the prosecution was relying on the conclusion of the study (that it is hard to randomly find even common fibres) as opposed to the specific numbers contained within it. Accordingly, the passage was unnecessary. She also stated that all the figures were canvassed during the trial, and that Mr. Pinkofsky cross-examined at length on the failure to perform TLC testing. (He also asked Mr. Erickson about the distinction between the TLC and MSP figures in the study.) She added that the prosecution could not summarize all the evidence of a nine month trial, and said they counted on the jury to recall the nature of the study.

Mr. McGuigan explained that he eliminated the passage because both Mr. Erickson and Ms. Nyznyk were questioned at length during the trial about the fact that TLC was not performed in the case, and about the effect that the test has. He also stated that he was telling the jury what the study showed, and "you end up with the last figures in order to accurately reflect the results of the study itself." Mr. McGuigan denied that he deleted the passage in order to obscure the fact that the comparison between the study and the case was not an apt one. He stated that this would have been clear to the jury.

I am not at all convinced that this would indeed have been clear to the jury. However, I do not believe that Ms. MacLean was directing her mind to the misleading aspect of referring only to the final figures when she wrote her note to Mr. McGuigan. Nor do I find that Mr. McGuigan removed these passages to intentionally mislead the jury, though it potentially had that effect. I also note that the defence did not object to Mr. McGuigan's closing address in this regard.

The Study's Conclusions

In his closing address referable to the study, Mr. McGuigan stated:

Now these people concluded, as a result of their study, that when you have *large numbers of more than one*

type or colour of matching fibres, the evidence of contact appears to be significant. There is a higher likelihood of contact having occurred if there is a high number of colours and fibre types. (Emphasis added.)

Elsewhere, he noted:

[I]t was Miss Nyznyk's expert scientific opinion that given the number of hair and fibre matches in this case, it was highly unlikely that they could all be due to contamination.

Mr. Erickson and Ms. Nyznyk both testified that in their expert scientific opinion the fact that there were several hair and fibre matches found in this case was significant. Miss Nyznyk testified that *if just one or two matches had been found, she would have to consider the possibility that it was just a random or coincidental match.*

Both Erickson and Nyznyk indicated, however, that the more matches found the less chance there is of having a random match. The chance of a random match diminishes with the more matches that are found and I submit to you that the trace evidence found in this case was not just a coincidence and is significant, probative evidence which assists you in arriving at the conclusion that the accused murdered Christine Jessop.

In addition, ladies and gentlemen, if you were to put all the science aside and look at the results just using good old common sense, I would submit that you would have to conclude that Christine Jessop was in that Honda motor vehicle on October 3rd, just prior to her death. (Emphasis added.)

The essence of the argument made by Mr. McGuigan is this:

1. The study found that large numbers of more than one type or colour of matching fibres strongly support direct contact.
2. Ms. Nyznyk's expert opinion is that randomness would have to be considered if there were only one or two matches.
3. There were more than one or two matches found in the Morin

case.

4. The numbers (and types) of fibres found in the Morin case were therefore 'significant' or 'large' within the meaning of the study.

In my view, Mr. McGuigan or Ms. MacLean cannot be criticized for this argument, which reasonably could be taken from Ms. Nyznyk and Mr. Erickson's advice to police and prosecutors and, more importantly, from their trial testimony. Ms. Nyznyk's expressed opinion that randomness would have to be considered as a possibility for *one or two matches* seriously overstates the value of fibre comparison evidence. The Jackson and Cook study did not support an inference that the number or type of fibre matches in the Morin case was 'large' or 'significant' and therefore unlikely to be explained by random occurrence.

It is, therefore, necessary to examine how the study came to be presented that way.

What the Court was Told About the Study

Ms. Nyznyk

At the second trial, Ms. Nyznyk was questioned at some length by Ms. MacLean about the Jackson and Cook study. She explained its purpose, methodology and findings.

Ms. MacLean ended her examination of Ms. Nyznyk on the issue as follows:

Q. And did the results of these tests indicate anything about the significance of fibre matches when they are found in vehicles.

A. Well it indicated that when you have large numbers of more than one type or colour of matching fibres, that the evidence for contact appears to be significant, that there was a very high likelihood of a contact occurring if you had a high number of colours and fibre, and/or fibre types involved and the more you have the more significance.

Q. And do you yourself accept the results of this study?

A. Yes, I do.

Q. Do you agree with that conclusion that you just indicated?

A. Yes. Just from my own experience in case work.

And later:

Q. Is there any significance that can be attached to the conclusions, or any significance to the conclusions that can be drawn by the fact that several hair and fibre matches are found, as opposed to finding just one?

A. Yes. If you found just one or two matches, then you would have to, you maybe have to consider the fact that it could have been a random match, that it just happened to be that those fibres were there. The more matches you have, the less the chance, the less the possibility of having a random match of something just happening to be there and matching.

As we have seen, Mr. McGuigan's closing address repeated and relied upon these answers.

At the Inquiry, Ms. Nyznyk testified that she never contemplated that the jury might use the study to conclude that there was a high likelihood of contact. She now admits that the jury may have so interpreted her evidence. Her findings did not support such a conclusion. She never advised the jury that such an inference was not legitimate. When asked why she did not, Ms. Nyznyk responded that she was never asked whether the study applied to the case. She stated that she does not offer opinions at trials unless specifically asked for them. She answered questions about the study simply because she was asked about it. She claimed that she did not know that the study was introduced to emphasize the likelihood of primary transfer. Ms. Nyznyk characterized some of her answers as commenting on general principles and not on the Morin case.

Ms. Nyznyk acknowledged that the cut-off point of two matches which she referred to at trial was not derived from the Jackson and Cook

study. She testified that she learned this from another study (she could not recall which one) and through personal experience in case work.

In my view, the jury could only infer from Ms. Nyznyk's trial testimony that she regarded the Morin matches as significant enough to favour direct contact and that she thought the study supported that view. I do not accept that there is any credible scientific support for the proposition that anything more than one or two matches tends to refute randomness.

Mr. Cook expressed similar concerns before me. He was asked how many fibre findings have to be made, according to his study, before they become significant enough to indicate primary contact. He responded that it is very difficult to pinpoint a particular number. The circumstances of each case must be taken into account when making such an assessment. In general, however, findings start to become significant when 10 or more similar fibres are found. It was clear that the *Morin* findings did not meet any threshold of significance.

Mr. Erickson

At the second trial, Mr. Erickson was questioned at some length by Ms. MacLean about the Jackson and Cook study. He testified that the authors were well respected. He outlined in some detail the study's findings. He stated that the study was generally accepted in the forensic community. He testified that the conclusion of the study was that it is very difficult, even with the most common source garment, to go out and randomly look at a vehicle and find that particular target fibre. He also stated that as more matches are found there is less chance of random occurrence.

At this Inquiry, Mr. Erickson testified that he never used the study to show that there were a sufficient number of fibre matches in Mr. Morin's case to bring it within the conclusions of the study. When asked why he thought he was taken through the details of the study at trial, he responded that he did not know, but he thought it was "in terms of the observations [he] was trying to make from that paper." He did not know that the prosecution had successfully applied to the Court for permission to use the study to help the jury understand the significance of the *Morin* fibre findings.

Mr. Erickson agreed that he presented evidence at the trial which would have led the jury to believe that the fibre findings were more consistent

with Christine Jessop having been in the Honda than with random occurrence. He testified that jurors may have inferred from his evidence that the study supported that conclusion, but that his evidence was not so intended.

In my view, the jury likely inferred from Mr. Erickson's testimony (though less directly articulated than Ms. Nyznyk's) that he, too, regarded the Morin matches as sufficiently significant to favour direct contact and that he felt the study supported that view.

At the trial, Mr. Erickson was asked in examination-in-chief whether some of the fibre matches found in the study might have been attributable to transfer between the various car owners in the study (who all worked in the same laboratory). He replied that this was possible. As previously noted, the environmental link *between cars* had no relevance to the *Morin* case, and there was little or no valid point in adducing the evidence. We have seen that the suggestion that the study and the *Morin* case had parallel environmental contamination was repeated by Mr. McGuigan in his closing address.

In re-examination at trial, Mr. Erickson was actually asked to review how the 10 'random' red fibres in the study were distributed amongst the various cars. He testified before the Inquiry that it never occurred to him that the jury might think it important that while four significant fibres were found in the *Morin* Honda, the most found in any single car (out of the 108 examined in the study) was three. Yet that is precisely how his evidence was later used.

If Ms. Nyznyk and Mr. Erickson truly did not intend to apply the specifics of the study to the Morin case (and felt that the specifics had no application), it is difficult to understand what they thought was occurring in the courtroom.

Mr. Cook

Mr. Cook reviewed the evidence given by Mr. Erickson and Ms. Nyznyk at the second trial. He felt that it reflected an attempt to relate his study to the case. The simple fact that it was introduced at trial indicated that someone was trying to link it to the case. Mr. Cook could not think of any good reason for introducing the study and then just leaving it there completely divorced from the case.

Mr. Cook believed that, left with evidence about the study along with evidence about the findings in the case, the jury might have inferred that the study had relevance to the case. The testimony of Ms. Nyznyk and Mr. Erickson might have led the jury to believe that the study gave added significance to the fibre findings. It might have led them to conclude that the matches were not random. He felt that the study had been misused. I agree.

Mr. Cook testified that the study's lack of relevance to the case should have been made clear. He would make sure, as a witness, that the trial judge knew it was irrelevant, if this was not elicited by the prosecutors. He agreed that it had been open to the defence in Mr. Morin's case to bring out the irrelevance of the study in cross-examination or through its own witnesses.¹³ It seems clear that the defence did not appreciate just how irrelevant the study was to the case. Mr. Pinkofsky conceded as much in an affidavit later filed in support of the application to tender Roger Cook's evidence as fresh evidence on appeal.

What the Prosecutors were Told About the Study

Ms. MacLean testified that, in preparation for the second trial, she asked Mr. Erickson if there were any studies dealing with finding fibres in cars that had relevance to the Morin case. One of the studies Mr. Erickson gave her was the Jackson and Cook study.¹⁴ Not surprisingly, she assumed that the study had some application to the case. In any event, she specifically discussed its relevance with both Mr. Erickson and Ms. Nyznyk. She was told that it would help demonstrate the significance of Ms. Nyznyk's findings. Ms. MacLean testified:

A. You see, my understanding then, of the Jackson and Cook study, was the ultimate conclusion that in that study they had looked for common fibres and found relatively few...And the conclusion they reached in the study was, well, if you find significant numbers of fibres, that was the phrase used, that was scientifically significant...Because you just wouldn't, at

¹³ Mr. Crocker would have expected the defence to try to distinguish the study. He would also have expected the defence experts to point out the study's irrelevance.

¹⁴ Ms. MacLean also referred to the studies which "they" provided. Ms. Nyznyk testified that she and Mr. Erickson provided the studies to Ms. MacLean.

random, find even common fibres. So the way it was explained to me that it related to our case was, well here we have uncommon fibres...So the chances of finding uncommon fibres would be even less likely than the two target fibres that were used there, the red wool and the brown polyester. So the way I understood it and the way it was explained to me that would assist our case was to demonstrate to the jury that in that case, with common fibres, there were very, very few found. So in our case, with uncommon fibres, it had scientific significance.

In preparing Mr. Erickson and Ms. Nyznyk to testify, Ms. MacLean told them that the study would be led from them. At no time did they explain the limitations of the study as it applied to Mr. Morin's case, or state that it had no relevance.

Both Mr. Erickson and Ms. Nyznyk testified that they had not intended to use the study to support the conclusion that Christine Jessop had been in Mr. Morin's car. Rather, they regarded the study as having some relevance to the case. Mr. Erickson said that he used it to support the observation that it is very difficult to locate a particular type of fibre through a random vehicle search, even if the fibre is the most common type of fibre. The significance of the Morin findings and the relevance of the study were only discussed to the extent that Christine Jessop could have been in the Honda. He did not use the study to state that it indicated primary contact. Other possible explanations existed and that is why he said the fibres could have come from the same source. Ms. Nyznyk testified that the study added to the evidentiary value of her findings because it demonstrated that "the more fibre types, the more matches 'that you have,' the more significant the results would be"; in other words, the more matches there are, the less chance there is of random contact.

Findings

I find that Ms. Nyznyk and Mr. Erickson failed to adequately explain the limitations upon the study's applicability to the *Morin* case. The most important issue respecting the fibre evidence was the *significance* of the fibre similarities. How likely was it that the number and nature of the fibres demonstrated direct contact, environmental contamination, or random occurrence? The study did not advance in any way the likelihood of direct

contact. The numbers of fibres found in the study were irrelevant to the numbers of fibres generated in the Morin case, due to the distinctions earlier discussed. Accordingly, the numbers contained in the study also did not advance in any way the likelihood of direct contact.

Ms. Nyznyk and Mr. Erickson both believed that the more similar fibres were found, the less likely that it was a random occurrence; the more uncommon the similar fibres found, the less likely it was random. They obviously believed that the study supported these general propositions. This misses the point. The study was designed to see when an inference can reliably be drawn that the fibre similarities are likely attributable to direct contact, as opposed to random occurrence. The study's results, if anything, support the defence position that the finding of similar fibres in the Morin numbers do not permit a reliable inference that direct contact is a more likely explanation than random occurrence. Further, the study says nothing about the likelihood that environmental contamination explains the Morin fibre similarities.

I believe that the distinctions now apparent between the Morin investigation and the English study were not then apparent to the scientists and certainly not explained to Crown counsel. I accept Ms. MacLean's testimony that Ms. Nyznyk and Mr. Erickson expected her to lead evidence relating to the study and must have known that she was doing so to show the significance of the fibre findings in this case. This should have prompted Ms. Nyznyk and Mr. Erickson to clearly articulate the uses that could or could not properly be made of the study. They failed to do so.

(iii) The Eight Percent Figure

As part of his submissions to the jury about the necklace hair, Mr. McGuigan reasoned as follows:

Mr. Erickson testified, including the teachers and classmates and one other person, there were hairs from 32 people examined. Out of that group, hairs from two of the classmates ... were found to have microscopic characteristics similar to the B9 necklace hair.

Mr. Erickson concluded that the others could not be donors of the necklace hair and they were eliminated.

So, including the accused's hair, which I will address in a moment, three out of 33 people were found to have hair similar to the necklace hair. Even though the hairs of the accused and the two classmates did not have the yellowish tinge to them, this did not prevent Mr. Erickson from including all three sources as similar.

Looking at the numbers we have in this case, if you include the hairs of Robert, Janet and Kenneth Jessop, which Ms. Nyznyk testified were also dissimilar to the necklace hair, there were in fact only three of 36 people found to have hair similar to the necklace hair. *Now mathematically, I submit to you that this means that only eight per cent, 8.3 to be exact, including the Jessops, 9 per cent without the Jessops, of the people whose hairs were looked at, had similar hairs to the necklace hair.*

The accused, therefore, falls within that eight per cent, because 92 per cent of the people were limited. The accused was not eliminated. (Emphasis added.)

Mr. Erickson testified that it is not scientifically valid to extrapolate from the sample of 36 to the general population. He added:

Q. Okay. Now that argument, the statistical argument that was being advanced by Mr. McGuigan in the closing address, was that argument, which was later presented to the jury, ever discussed or run by you or Ms. Nyznyk in your presence?

A. No.

Q. How would you have reacted if the argument had been run by you?

A. I would have said that you can't use that statistical number. In fact, when it comes to hair comparison, I would stay away from any statistical number in court. We don't use statistics with respect to hair comparisons.

Q. And again, why not?

A. Why not? Well, it's subjectivity to start with, as I describe hair comparisons, subjectivity conditioned by experience and one looks at, over a period of time, in

terms of these comparisons. But we don't say that this represents 1 per cent of the population; these characteristics that I see here in a hair, for example, represents 1 per cent of the population or 10 percent of the population.

We can give you general figures in terms of — we know red-heads are the smallest percentage of the population with respect to hair colour, so that if you had a reddish coloured hair, is of the smallest sub-population, as opposed to a brown to a dark brown hair, which we know are more prevalent in the population. So we just don't give statistics with respect to hair comparisons.

Mr. Erickson later agreed that Mr. McGuigan never explicitly extrapolated the eight percent figure to the general population, and simply did a mathematical calculation.

Mr. McGuigan did not specifically recall whose idea it was to advance this argument. Ms. MacLean testified that Mr. McGuigan was the one who wanted the mathematical figure in the address. She further commented on the passage:

A. Mr. McGuigan wanted this in, and we discussed this issue, and he asked me to include it. It's in the draft, but that's at his request, and I remember us discussing the point about this, and I had raised an issue about statistics with Norm Erickson about the fibres and hairs, and he said "You can't really do a statistical analysis there for a number of reasons"...

[S]o when this issue came up, I said to Leo, "Well, you have to be careful, because they had said you can't really do that statistical thing with the fibres. But what Leo wanted to say wasn't inaccurate; it was 8 percent of the hairs looked at, and he didn't say 8 percent of the general population; he was simply saying 8 percent of all the people looked at. And I thought that's exactly what he was trying to convey to the jury. I don't know why he wanted to express it in mathematical terms, but...

Q. Why do you think?

A. Well, I don't know.

Q. Well, it's not fair. The accused falls within the 8 percent of that group; is that fair?

A. He did fall within 8 percent of that group.

Q. I mean, would you write that again that way?

A. But I didn't write that. I wrote it because of Mr. McGuigan. I would not myself have said it based on my discussions with Mr. Erickson about statistics. I indicated that to Leo, and Leo decided to include it, and I deferred to his judgment, but I indicated that I didn't agree with using the numbers.

.....

A. I would not have done it. I told Leo that — you know, I wouldn't have done it this way. He chose to do it, and I guess other people can judge what it meant. But what he stated was not inaccurate.

Ms. MacLean did not feel that the jury had been misled by the calculation included by Mr. McGuigan. Mr. McGuigan did not misstate anything; he simply stated the facts and applied a percentage to them. She also noted that the jury was told right afterwards that the necklace hair had extremely limited probative value.

Mr. McGuigan testified as follows about his mathematical calculation:

Q. Now, what was the point that you were endeavoring to make with the jury in putting before them the mathematical calculations reflected in that portion of the closing address?

A. Well, first of all, I was amazed that there were two others who had characteristics that would cause the examiner to say that they could not be eliminated as coming from that particular person. And as a result of that, and probably based on something that Mr. Pinkofsky was doing with the hairs, he was saying how many had dark brown hair and was fourteen, so if you take — so out of fourteen, you had this particular number.

What I wanted to do was to focus in on that group and

the words are of whose hairs were looked at, I'm limiting it to the actual people who took part in this — the classmates and the Jessops, who took part in this, that out of that group, this is what it comes down to, because I thought, quite frankly, that was a much more palatable number to put before the jury as an advocate.

And I know that from reading about the past that the issue was just to, somehow, apply to the public at large, and I think it's clear from the wording that it doesn't apply to the public at large. I talk about the people who were examined, and that's certainly not — the whole public wasn't examined.

Q. I'm not sure I understand that, and since I was the person that was putting that as a potential extrapolation to the public, perhaps I'll ask you this. When you were telling the jury that the accused falls within the 8.3 percent of the people examined whose hair compared favourably to the necklace hair, was it not an argument that you were advancing to the jury that when one looks at that very small number of people within this group that had been examined that conformed to the necklace hair, one can infer generally that very few people will have a matching hair? I mean, wasn't that the whole thrust of why you were putting it?

A. No. It wasn't a thrust at all. I was taking a factual situation, an actual factual situation and limiting it to that. As I said, I was amazed that three out of whatever the number is, that had similar hair. I would have thought that if you did the public, it would be a lot less than that.

Q. Well, that's what I don't understand then. So, let's say you, as an advocate, are trying to get into the minds of what you'd like the jury to do, and you'd like them to go back in the jury room and say, "Mr. McGuigan told us that only 8.3 percent of the people whose hairs were examined, had hair that could conform to the necklace hair, now, what should we do with that?" And what would you like them to do with that?

A. Well, as I said to you, I don't know the answer to this. But I would be totally surprised that if they had gone to the — whatever it takes to constitute a public examination of hairs, that I'd be willing to bet a fair

amount that you wouldn't get 8. something percent of the public who had hairs that matched the hair that was in question here. I just — it astounds me that that number of classmates' hairs, two classmates' hairs were similar to this.

Now maybe it's my lack of knowledge of the hair and fibre trade, but that just astounded me. And all I wanted to do was to take a factual situation, which we had there, and to dress it up so it was a little more palatable; that's all.

Q. I'm not quite sure I know what you mean. Palatable in what sense?

A. Well, I just thought if I was on the jury and I heard there were two classmates, I would say I don't care what those experts say, this doesn't mean much, this study or science of hairs. And so to try and put it just in another — just another way of saying what had been said before. But giving it a percentage which I think sounds a little better when you use a percentage than it does if you use the actual figures that are there.

So there's no attempt to extrapolate it from the general public because it's my opinion that a) you'd be inaccurate because it wouldn't be that high, and b) I never tried to do that because I used the words of the — whose hairs of the people whose hairs were looked at.

Mr. McGuigan acknowledged that he never discussed the issue with Ms. Nyznyk or Mr. Erickson. He explained that he thought it was just simple math.

Mr. Smith testified that there was some discussion amongst the Crown attorneys about referring to the mathematical calculation in the jury address. He said:

And my recollection is that that came up in response to something that Mr. Pinkofsky had said with respect to those particular hairs. And the conversation, as I recall, it was that Mr. McGuigan thought that by pointing out that, yeah, there were two other classmates' hairs that matched, and I think, frankly, Mr. McGuigan was very surprised that had happened, that it put it in a proper

perspective to point out that they were only 8.3 percent, or whatever the figure was, of the people who'd been sampled.

Findings

I accept Ms. MacLean's evidence that it was Mr. McGuigan's idea to rely upon this argument and that she registered her concern about it. Everything in Mr. McGuigan's closing address was there for a purpose — not surprisingly, given his status as a pre-eminent advocate. The introduction of the 8.3 percent figure into his address was obviously done so as to cause the jury to infer that the necklace hair was likely Mr. Morin's, given the small percentage of classmates whose hair was equally similar. The argument was invalid, since the small sample (and the absence of any evidence as to the composition of the class) permitted no such inference to be properly drawn. However, I cannot find, notwithstanding Ms. MacLean's intervention, that Mr. McGuigan deliberately made an argument which he knew to be fallacious.

(iv) “As Good as it Gets”

In his closing address, Mr. McGuigan made submissions about the strength of the hair findings in the case. This is what he said in part:

I suppose if you had someone who had a hair that was seven feet long, and you found another seven-foot hair, you might be very close to say I think, probably, all the other things, that that came from that head. But that's not normal — it doesn't permit you to say it came from a specific source. If the questioned hair possesses similar characteristics to the known sample, the strongest conclusion that the hair examiner can arrive at is that the questioned hair is similar to the known hair and could have originated from that source. So, similar to the known hair and could have originated from that source. The hair cannot be excluded as coming from that source. That's just another method of saying it.

This type of expert opinion, in relation to hair, that's *as good as it gets in the science of hair comparison*. It *doesn't get any better*.

.....

After conducting all the scientific tests for those hairs, which I discussed with you earlier, both Mr. Erickson and Miss Nyznyk formed an expert scientific opinion that all three hairs located in the accused's car were similar to the known hairs of Christine Jessop and could have originated from that source. As I said to you earlier, ladies and gentlemen of the jury, dealing with the examination of hair, *it doesn't get any better than that.* (Emphasis added.)

Mr. Erickson and Ms. Nyznyk indicated to me that it was incorrect to say that a finding of 'could have' is truly 'as good as it gets.' The correspondence between hairs may permit a finding that two hairs are 'consistent with' a common origin. In their trial testimony, Mr. Erickson and Ms. Nyznyk differed on how often such a finding (which is said to involve a 'one-to-one correspondence') can be made. Their evidence can be interpreted to mean that such a finding can be made rarely (Nyznyk) or often (Mr. Erickson).

Findings

Ms. MacLean drafted the reference to 'could have' being the strongest conclusion a hair examiner can reach. Mr. McGuigan inserted the references to "as good as it gets" and "it doesn't get any better" in the closing. I find it difficult to be overly critical of either for the use of this language.

Mr. McGuigan explained that, while it is theoretically possible to make a finding of consistency in hair comparisons, 'could have' was indeed the strongest conclusion possible in the context of the evidence led. Prior to the passages in issue, he had mentioned to the jury that the ideal hair comparison is a one-to-one comparison and that Ms. Nyznyk testified that was a very rare occurrence. He suggested that when the quoted passage is considered in the context of the words that preceded it, it is clear that he was saying that, while the hair evidence in the Morin case is not the best, it is as good as it gets when there is no source. Mr. McGuigan also pointed to two later passages (dealing with fibre evidence) where he specifically stated that 'could have' is the strongest opinion possible when there is no known source. Ms. MacLean supported Mr. McGuigan's evidence in this regard.

The hair comparisons were admittedly weak. Mr. McGuigan intended, as an advocate, to frame the evidence in its most positive light. The following illustration makes the point. If a robbery victim blindfolded from behind says that the accused could be the robber because the perpetrator is tall and the person who blindfolded her also was tall, one could state that this evidence is ‘the best that it gets’ from a witness blindfolded from behind who had no opportunity to see or hear the perpetrator. Such a statement would be accurate, but not terribly helpful.

In the context of a lengthy criminal case, involving complicated and conflicting evidence, the dangers are greater that such language could potentially mislead the triers of fact, yet remain within the bounds of ethical advocacy. I recognize that this problem arises in the context of an adversarial proceeding, and I will later comment on the important role that the trial judge should play in situations of this kind.

(iv) The Likelihood of a One-to-One Match

Mr. McGuigan referred in his jury address to Mr. Erickson’s opinion about the likelihood of finding one-to-one matches in hair comparisons. He stated: “[I]t is a reality to find a one-to-one match and it does happen from time to time although he could not say how often.” Ms. MacLean had written in her draft address a seemingly more exculpatory summary of the evidence: “[I]t is a reality to find a one-to-one match, and it does happen *quite often*, although he could not say how often” (emphasis added). Ms. MacLean testified before the Commission that Mr. McGuigan was responsible for the change. Mr. McGuigan did not recall whose idea it was. I accept Ms. MacLean’s evidence in this regard. Ms. MacLean’s draft more accurately reflected Mr. Erickson’s evidence.

(v) The Chart

In the course of his closing address to the jury, Mr. McGuigan made reference to a chart which contained pictures of Mr. Morin, Christine Jessop, the Morin Honda, the Morin home, and items from the body site. The various pictures were connected by a series of lines which were meant to relate to the hair and fibre findings in the case. The lines were actually drawn individually on a series of overlays, so that Mr. McGuigan could add each new hair or fibre to the chart, one at a time. Also typed on the bottom of the overlays

were brief synopses of the findings with respect to each of the hairs and fibres. When all the overlays were in place, the chart effectively depicted all lines as connecting Christine Jessop to Guy Paul Morin (or to their related possessions). An issue before the Commission was whether the chart fairly represented the evidence of Ms. Nyznyk and Mr. Erickson at the trial.

The chart was prepared in advance of the second trial by Sergeant Chapman at the instance of Mr. Scott. Ms. Nyznyk and Mr. Erickson were not involved in its preparation. Mr. Cook testified that he would expect the Crown to consult with their experts before using a visual aid at trial. Mr. Scott explained that he asked Sergeant Chapman to prepare the chart because Ms. Nyznyk had not prepared the demonstrative aids requested of her for the first trial. He acknowledged that he did not consult with anyone at the CFS about the chart.

The defence objected to the use of the chart at trial. The trial judge, however, ruled that it could be used by the Crown during its closing address. The Crown agreed to amend the chart should the evidence at trial differ from it.

Mr. Erickson testified that he is opposed to using demonstrative aids to illustrate hair and fibre findings. In particular, he thought that the chart in Mr. Morin's case might have had a prejudicial effect, because it did not accurately reflect his opinion or its limitations. He feared that it might have led a lay person to believe that Christine Jessop had been in Mr. Morin's car, whereas on his evidence there may actually have been no connection between Christine Jessop and Mr. Morin at all. The chart presupposed that all of the possible hair and fibre connections were facts.

Mr. Erickson said his concerns were appeased somewhat by the fact that the trial judge heard argument about the potential prejudice of the chart and ultimately limited its use to the Crown's jury address.¹⁵ He also accepted that, when referring to the chart in his address, Mr. McGuigan accurately outlined the hair and fibre findings. He further acknowledged that the chart's synopses accurately reflected the findings. He remained concerned, however, about the impact that the chart's visual presentation may have had on the jury.

¹⁵ The trial judge ruled that the Crown could not make the chart an exhibit or refer to it during the examination of witnesses.

Ms. MacLean acknowledged that all the lines on the chart could have pointed away from Mr. Morin and to someone or something else. But, she said, the chart was meant to be a persuasive visual summary of the Crown's argument. It was open to the defence to prepare an alternative chart, or to argue in its jury address that the Crown's chart was somehow misleading. Mr. Erickson agreed that the defence could have prepared its own chart, and that a visual representation of evidence can be an effective element of advocacy.

Findings

It is clear that the prosecutors cannot be criticized for the introduction of the chart. It was provided to the defence in advance, and a ruling obtained from the trial judge permitting its use. It has been suggested that such charts are potentially misleading and should be banned in the future. It may be preferable that charts which address forensic evidence should be introduced through the experts to permit full exploration of the issues raised by those charts. However, the use of a chart to complement closing argument is a sound advocacy technique. A trial judge has the discretion to disallow its use. Further, the trial judge can outline for the jury the potential dangers associated with the chart — here, the accumulation of connecting lines could mislead the jury, given the tenuous connections established by the hair and fibre evidence. In my respectful view, the trial judge did not adequately warn the jury about the dangers associated with the chart. Ultimately, the problem identified with the chart may be more reflective of the problem associated with the evidence itself, than with any systemic concern about the use of charts generally.¹⁶

(vi) The Overall Significance of the Hair and Fibre Evidence

What was said in the jury address

Mr. McGuigan made a number of submissions in his address to the jury about the overall significance of the hair and fibre findings. Mr. Erickson was asked to comment on many of them. (Some of what follows has been

¹⁶ In my view, the new Crown Policy on Scientific Evidence, referred to later in this Report, deals adequately with the issue of charts and other visual aids. It provides, *inter alia*, that “it could be dangerous to use a visual aid in court without first reviewing it with the scientist to ensure that it accurately conveys the true force and effect of the evidence.”

alluded to earlier in this Report.)

Mr. McGuigan stated that the hair and fibre findings prove that there was contact between Mr. Morin and Christine Jessop at the time of her death. Mr. Erickson did not accept that his evidence proved that. Mr. McGuigan stated that the evidence established that the only way the fibres could have got onto Christine Jessop's clothing was through contact with Mr. Morin and his car at the time of her death. Mr. Erickson again disagreed, and pointed out that he had mentioned the possibilities of random occurrence and environmental contamination in his evidence. Mr. McGuigan further stated as follows:

Mr. Erickson and Miss Nyznyk both testified that in their expert scientific opinion the fact that there were several hair and fibre matches found in this case was significant. Miss Nyznyk testified that if just one or two matches had been found, she would have to consider the possibility that it was just a random or coincidental match.

Both Erickson and Nyznyk indicated, however, that the more matches found the less chance there is of having a random match. The chance of a random match diminishes with the more matches that are found and I submit to you that the trace evidence found in this case was not just a coincidence and is significant, probative evidence which assists you in arriving at the conclusion that the accused murdered Christine Jessop.

In addition, ladies and gentlemen, if you were to put all the science aside and look at the results just using good old common sense, I would submit that you would have to conclude that Christine Jessop was in that Honda motor vehicle on October 3rd, just prior to her death.

Mr. Erickson testified that his evidence, by itself, did not substantiate that conclusion. Overall, Mr. Erickson said he was shocked and troubled by Mr. McGuigan's jury address, since it suggested that primary contact was the only explanation for the findings, whereas he had testified to two other possible explanations. He also said that Mr. McGuigan placed more weight on the hair evidence than he should have.

Mr. McGuigan ended his address in relation to the hair and fibre

evidence with the following comments:

Isn't it a coincidence that pink-red animal fibres that were found on Christine's running shoe and her blue trim socks matched a fibre from the police taping of the accused's car? Isn't it a coincidence that the purple-pink animal fibres that were found on Christine's blue corduroy pants, her pullover and sweatshirt matched two fibres from the accused's car; one, a taping from the passenger side rear floor; two, vacuuming of the floor behind the driver's seat; three, dark grey animal hair fibres were found on Christine's turtle neck sweater and the taping of the Morin livingroom rug; that the pink polyester fibre were found on the recorder pouch that matched a fibre found on a gold seat cover seized from the hatchback of the Honda and that three separate hairs that match Christine Jessop's hairs were found in the accused's Honda motor vehicle; one from the taping of the passenger side rear floor, vacuuming of the rear seat area and vacuuming of the left corner of the Honda trunk; that a dark brown hair found in the chain that was around Christine Jessop's neck that cannot be eliminated as coming from the accused due to the similarities found?

Mr. Cook's views have already been noted. He, and the other forensic experts who testified before me, did not believe that these findings defied coincidence, as suggested by Mr. McGuigan. Interestingly, Mr. Erickson said that he never expected Mr. McGuigan to present his evidence in such a powerful and compelling way.

Mr. McGuigan was not asked to comment on these passages from the jury address. Ms. MacLean, who wrote most of the passages,¹⁷ testified that in them the Crown was not trying to summarize what the experts said. They were acting as advocates, presenting the Crown's position to the jury. She also pointed out that evidence which potentially weakened the inferences to be drawn was also canvassed before the jury.

Mr. Erickson testified that he was never told what the prosecutors intended to do with his evidence, and that he would have been shocked to learn that it was one of the most significant pieces of evidence marshalled

¹⁷ She did not write the last sentence of the second last quoted passage.

against Mr. Morin. Ms. Nyznyk's evidence on this issue changed throughout the course of her testimony. She initially testified as follows:

Q. Now, were you aware when you were giving this evidence at the first and second trials, that the prosecution was relying upon this fibre evidence to support its conclusion that Christine Jessop had been in the Morin Honda shortly before her death?

A. That I'm not aware of.

She later stated:

Q. So that, all of your findings — and I'm going to try to avoid the terminology that we've been using: consistent, and inconsistent with, and could have, and so on, but as I understand your evidence, your findings that five fibres from the Morin Honda and residence, were similar to some fibres found at the body site, does not demonstrate as far as you're concerned, that Christine Jessop had indeed been in the Morin Honda?

A. That's correct.

Q. And I guess going back to one of my earlier questions, were you aware back during the time of the first or second trials, that the Crown was drawing upon this fibre evidence to support that very conclusion? That the fibre evidence demonstrated, together with other evidence in the case, that Miss Jessop had indeed been in the Morin Honda. Were you aware of that, or can you say?

A. I really can't say.

Commission counsel returned to this issue in re-examination of Ms. Nyznyk:

Q. Do you think, again, that it's possible that ... back when you gave the evidence, it may very well have been that you appreciated at that time what the Crown's theory was about the hair and fibre evidence, what use was intended to be made of the hair and fibre evidence, and how the Crowns appreciated your evidence bore upon that issue? Do you think that's possible?

A. Yes, I think it's possible.

What the Prosecutors Were Told

Ms. MacLean

Ms. MacLean gave fairly detailed evidence concerning what Ms. Nyznyk and Mr. Erickson told Crown counsel prior to the second trial. Her recollection was often supported by her notes.

She testified that both Ms. Nyznyk and Mr. Erickson said that the hair and fibre findings were significant. Ms. Nyznyk never warned the Crown attorneys not to build a case around her evidence because it was so weak. Mr. Erickson never said that the number of findings in Mr. Morin's case was not high enough to establish contact. Ms. MacLean thought he said the opposite, because when he was asked whether more matches would be better, he (and Ms. Nyznyk) responded in the negative, explaining that the numbers were already significant because animal hairs fibres are rare and the polyester fibres had some distinguishing features. Neither Ms. Nyznyk nor Mr. Erickson ever said that their findings did not support the conclusion that Christine Jessop had been in the Morin Honda. Ms. MacLean acknowledged that neither explicitly said that was the preferred conclusion; Ms. Nyznyk mentioned all three options (contact, environmental contamination and random transfer). However, Ms. Nyznyk did say that the evidence was sufficient to make a connection, which Ms. MacLean took to mean a connection with the car. (Ms. MacLean has a note of this comment.) Both Ms. Nyznyk and Mr. Erickson told Ms. MacLean that it was unlikely that all the hair and fibre findings were due to environmental contamination. Ms. Nyznyk also suggested that it was highly unlikely all the matches were due to secondary or tertiary transfer.

Ms. MacLean stated that both Ms. Nyznyk and Mr. Erickson told her that the likelihood of random matches decreases as the number of matches increases. Ms. Nyznyk did not say that was only a general rule. She mentioned it in the context of a discussion about the fibre findings in Mr. Morin's case. Ms. MacLean was told that coincidental matches are relatively rare. She was also told that random occurrence might explain one or two matches, but that findings became more significant as the number of matches increased. She had a note of Ms. Nyznyk stating that the number of matches strengthens her opinion. She acknowledged that Mr. Erickson never said that

the number of matches in Mr. Morin's case was high enough to rebut the *possibility* of random occurrence.

Ms. MacLean maintained that neither Ms. Nyznyk nor Mr. Erickson ever said the hair evidence as a whole was weak. Both experts stated that the evidence of the necklace hair was weak, but they also conveyed the impression that the car hairs had some degree of strength and scientific significance. They said that Christine Jessop's hair and one of the car hairs shared an unusual characteristic (a fragmented cortical fusi) and that one of Ms. Jessop's hairs and one of the car hairs had a broken part in the same spot. Ms. MacLean accepted that Ms. Nyznyk and Mr. Erickson only said that the car hairs could have come from Christine Jessop,¹⁸ and that neither said the hairs confirmed that Christine had been in the Honda. However, she pointed out that Mr. Erickson once told her the car hairs were a very good match. (This comment is also reflected in Ms. MacLean's notes.) Ms. MacLean said she believed both experts thought the car hairs were very good matches.

Ms. MacLean testified that the prosecutors were told that fibre type is a very important factor in an expert's opinion about how significant fibre findings are: the rarer the fibre type, the more significant the finding. Ms. Nyznyk and Mr. Erickson advised the prosecutors that dyed red animal hairs made up less than one percent of all the fibres in the world. Ms. MacLean explained that the unusual nature of the fibres in Mr. Morin's case was very important to the prosecutors.

Ms. MacLean stated that Ms. Nyznyk told Detective Fitzpatrick that a defence expert, Skip Palenik, thought the hair and fibre findings were 'good' and that the necklace hair was an excellent sample. Detective Fitzpatrick conveyed this information to Ms. MacLean on December 20, 1985 (when Ms. MacLean recorded it in a note).

Mr. McGuigan

Mr. McGuigan's evidence largely supported that of Ms. MacLean. He testified that he was never told that the hair and fibre evidence was weak, or that the Crown should not build a case around it. He recalled a meeting where

¹⁸ Ms. MacLean also accepted that Mr. Erickson told her the hairs could have come from three different people.

Ms. Nyznyk and Mr. Erickson indicated that they had a scientifically significant number of matches. The prosecutors had asked them to conduct further examinations, and they responded that they did not need to do more; they already had sufficient matches to draw the inference that Christine Jessop had been in the Honda. Mr. McGuigan did not recall whether Ms. Nyznyk and Mr. Erickson said that Christine had definitely been in the car.

Ms. Nyznyk

Ms. Nyznyk testified that she told the Crown attorneys that her evidence was weak and they should not build a case around it. She tried to convey the impression that her evidence did not assist one way or the other.

Ms. Nyznyk denied that she led the prosecutors to believe that her evidence placed Christine Jessop in the Honda. She mentioned all the potential explanations for her findings, only one of which was contact, and explained that they were all equally possible. She did not specifically tell Crown counsel that her evidence did not assist in proving that Christine Jessop had been in the car,¹⁹ but it would not have occurred to her to say that. A determination of that issue falls to the Court, and the Crown knew that her findings by themselves did not place Christine Jessop in the Honda.

Ms. Nyznyk did not recall telling Ms. MacLean that her findings were significant enough to make a connection, and that more findings were not necessary. She acknowledged, however, that she may have told the Crown attorneys that once an analyst finds significant results, she stops, satisfied that she has significant findings. *Ms. Nyznyk wrote that comment in her own notes. She also wrote in her notes that she did not need to find more matches because she already had a scientifically valid result. Ms. Nyznyk testified that she did not know whether she or someone else said that. She could not recall why she wrote it down.*

Ms. Nyznyk accepted that she would have told the Crown that the chances of random association decrease as the number of matches increases. She may have implied that more matches increase the likelihood of contact.

¹⁹ Although Ms. Nyznyk repeated this evidence more than once, she also once testified that she told Mr. McGuigan that her findings did not support the conclusion one way or the other.

She may also have related that principle to the *Morin* case. She wrote in her notes of January 23, 1991, that coincidental matches are rare. Ms. Nyznyk acknowledged that she gave Crown counsel the impression that the number of matches in Mr. Morin's case made it highly unlikely that they were all due to environmental contamination.

Ms. Nyznyk testified that she never told the authorities that the car hairs confirmed that Christine Jessop had been in the Honda. She accepted that she might have told them it was significant that some of the fibre findings involved an unusual type of fibre (dyed animal hair). She agreed that she once told Crown counsel and the police that one of the defence experts agreed with her findings. She explained to them that his opinion supported the correctness of her results.

Ms. Nyznyk ultimately conceded that she could not recall exactly what she said at her meetings with the Crown attorneys. She did not know if she had filled in gaps in her memory with information about what she would have liked to have said. She accepted that her opinions were not expressed or understood as they should have been.

Mr. Erickson

Mr. Erickson testified that he told Crown counsel that the findings made by Ms. Nyznyk had scientific validity and could support the contention that Christine Jessop had been in the Morin Honda. He did not recall Ms. MacLean asking him if there were enough matches to take to a jury. (Ms. MacLean has a note of this.) He did not know if he told the prosecutors that the number of fibre findings in the *Morin* case was not high; he did not recall a conversation about numbers. He understood that the Crown attorneys believed the evidence against Mr. Morin became stronger as the number of matches increased. He never advised them there was anything wrong with that belief.

Mr. Erickson sent a letter to Mr. Scott on March 28, 1990, explaining the limitations of the necklace hair finding and indicating that its probative value was extremely limited. He told Ms. MacLean that the car hairs only 'could have' come from Christine Jessop. At the same time, Mr. Erickson conceded that he may have said that Christine Jessop's hair had a distinctive characteristic which provided a basis for comparison with the three car hairs. He accepted that he once told Ms. MacLean that the car hairs were good

comparisons, and that he and Mr. Palenik (an expert engaged by the defence) agreed that there were no problems with their comparison to Christine Jessop's hair.

Mr. Erickson once told Ms. MacLean that all the fibre matches in Mr. Morin's case were good ones. He also told the Crown that the animal hair fibres were unique, and that the polyester fibres had distinctive shapes and markings.

Findings

I accept Ms. MacLean's evidence (supported by Mr. McGuigan) as to the thrust of the opinions communicated by Ms. Nyznyk and Mr. Erickson to them. In regard to the fibre comparisons, I find that the thrust of the experts' opinions, as communicated to the prosecutors, was that the findings were significant, that they favoured the inference that Christine Jessop had been in the Morin Honda, and that the number and nature of the fibre similarities did not eliminate the possibility of environmental contamination or random occurrence, but made each an unlikely explanation. Environmental contamination also raises additional issues, and this is addressed immediately below.

(vi) Environmental Contamination

What was Said at Trial

Ms. Nyznyk testified at the second trial that it was highly unlikely that all the matches were due to environmental contamination. Mr. Erickson testified that he could not rule out the possibility that the findings could have been affected by environmental contamination; he was not asked to state how likely an explanation that was.

Mr. McGuigan made submissions to the jury on the issue of environmental contamination, arguing that it was an unlikely explanation. Some excerpts follow:

You have heard the evidence that Christine Jessop had never been in the Morin house and that she had never been in the Honda motor vehicle up to October 3rd, 1984, and it was Miss Nyznyk's expert scientific

opinion that given the number of hair and fibre matches in this case it was highly unlikely that they can all be due to contamination.

.....

Ladies and gentlemen, the defence has suggested to you that you should not place any weight on the evidence of hairs and fibres in this case because of the possibility of contamination. As you heard contamination is possible in many circumstances, and is always a factor that must be considered in cases that involves this type of evidence. And yet, it is still a type of evidence and a forensic science about which experts testify in our courts all the time.

Do you really think that all the hair and fibre matches in this case can be explained away by contamination? Now I ask you to look at this hair and fibre chart that is the demonstrative exhibit. I ask you how so many different matching fibres types and colours found on so many different articles of clothing all worn by Christine Jessop on October the 3rd could all be due to contamination, including the recorder pouch, which was received on that very day. I ask you to remember the scientific studies about how few fibres are found simply at random.

Mr. McGuigan followed this by detailing the evidence which purportedly demonstrated how limited the contact was between the Jessop and the Morin families.

The Possibility of Environmental Contamination Explained

Mr. Cook was a most impressive witness before me. He demonstrated objectivity and precision in his scientific opinions. I accept without hesitation his opinion that the fibre similarities here could be equally explained by environmental contamination as by direct contact between Christine Jessop and Guy Paul Morin.

During his testimony before the Commission, 11 pieces of evidence from the second trial were put to Mr. Cook as possible indications of a shared environment between the Morins and the Jessops. They were:

1. the two families lived about 50 feet from each other;
2. the two families often used the same laundromat;
3. Guy Paul Morin went into the Jessops' home in September, 1984, to light the pilot light for the Jessops' hot water tank;
4. in November or December, 1984, Guy Paul Morin took the Jessops' dog into the Jessops' residence and visited with Robert Jessop for half an hour;
5. the Jessops had been on the Morin property several times;
6. Mr. Morin's parents were inside the Jessops' home after Christine Jessop's funeral on January 10, 1985, at which time Alphonse Morin may have been taken up to Christine Jessop's room;
7. in September, 1984, Robert Jessop rode with Mr. Morin's brother in the brother's truck;
8. on October 4, 1984, Janet Jessop, Robert Jessop and Alphonse Morin drove in the Jessop car to search for Christine Jessop;
9. the families, including Mr. Morin and Christine Jessop, used to chat outside their houses;
10. some time after Christine Jessop disappeared, Robert Jessop once went to the back door of the Morins' house;
11. Christine Jessop once came onto the Morin property to show off her puppy.

Mr. Cook commented as follows:

A. I think the important thing with regard to those facts is that they all point to the possibility of a shared fibres population between the two families. Some more so than others; I think if people are just standing talking to one another across a fence, for example, then the

chances of transfer of fibres there are very small; negligible, to be honest. But where someone is going into another house and sitting down and chatting for half an hour, or sharing a car with someone, then there's a very strong possibility that fibres from one family are going to be deposited in the other family's home, and vice versa. So it just points to the shared fibre population between the two families. So in my view, what that points to is the fact that the fibres findings in this case can be explained by the fact that there is a shared environment between the two families.

.....

A. I think that those findings are explained as well by the shared environment as they are by her being in the car. So I think that evidentially, that the fibres findings are neutral.

Mr. Cook felt that the fact of a shared environment was so important that it should have been brought out in evidence and possibly even mentioned in the original CFS reports.

In his evidence before the Commission, Mr. Crocker agreed with Mr. Cook's conclusion that the shared environment in the *Morin* case essentially negated the significance of the fibre findings. He did not recall if he ever communicated his opinion to the Crown. Mr. Lucas testified that the experts should have advised Crown counsel and the police that the possibility that environmental contamination decreased the significance of the fibre findings.

Mr. Cook was also asked about evidence that some of the investigating officers in the case had contact with several of the persons, places and things sought to be linked through the hair and fibre evidence: the body site, the Morin Honda, the Morin residence, the Jessop property, Christine Jessop's remains and Mr. Morin himself. He thought such contact raised the danger that the police will inadvertently transfer their own (similar) fibres to objects associated with both the accused and the victim, thereby contaminating future findings of similar extraneous fibres. But while the risk of such contamination existed, it was low, given that the contact with the various persons, places and things was generally quite far apart in time.

Mr. Cook testified that in England police officers are advised not to attend scenes sought to be connected through forensic evidence. Mr. Lucas

did not think the CFS 'Lab Guide for the Investigator' included such a suggestion.

What the Prosecutors and Scientists Discussed

Mr. Erickson

At the Inquiry, Mr. Erickson accepted that environmental contamination could have played a factor in Mr. Morin's case. He explained that he had thought otherwise at the time of the trial because he had been advised, by either the police or the Crown, that Christine Jessop had never been in the Morin Honda, that she had had no contact with Mr. Morin, and that there had been virtually no social contact between the two families. Mr. Erickson testified that experts operate on the basis of the facts given to them, and their opinions are only as good as the information they receive.

He accepted that he may have discussed the issue of environmental contamination with the Crown attorneys before he testified (although he did not recall it), but stated that he had not been advised of many of the 11 possible indications of contact between the families listed above.²⁰ He had also not been told that, during the first trial, the police had conducted a test at the laundromat used by both families which determined that fibres could be transferred through successive washings. He agreed that such evidence was relevant to a determination of whether environmental contamination could explain the fibre findings in Mr. Morin's case.

Ms. Nyznyk

At the Inquiry, Ms. Nyznyk stated that the evidence of a shared environment between the Jessops and Morins, as well as the evidence of potential police contamination, could explain her fibre findings in the case. *She further testified that this explanation was as likely as any other.* Ms. Nyznyk thought she had expressed this view at the second trial, and she had not intended to imply at the second trial that her fibre findings could not be explained by environmental contamination.

²⁰ Specifically, Mr. Erickson testified that he was not advised of the information referred to above in points 2, 3, 6, 7, 8 and 9.

Ms. Nyznyk was advised at the first trial of the evidence which suggested a shared environment and possible police contamination (leading to the inference that she was aware of it at the second trial). She testified before the Commission, however, that she had never been told about the laundromat test conducted by the police.

The Crown Attorneys

Mr. McGuigan testified that the experts did not tell the Crown attorneys that environmental contamination was a serious problem in the case. He did not recall discussing the issue with Mr. Erickson and Ms. Nyznyk, but he was not present for all the meetings and such a discussion may have occurred when he was not there. He added that the issue was a live one at the first trial, and he hoped that Ms. Nyznyk would have advised Mr. Erickson of the significant issues in the case.

Ms. MacLean testified that, since the issue had arisen at the first trial, she discussed with Mr. Erickson and Ms. Nyznyk in advance of the second trial whether the fibre findings could be explained by the fact that the Jessops and Morins were neighbours. Both Ms. Nyznyk and Mr. Erickson told her that, given the number of hair and fibres matches in the case, it was unlikely that they could all be due to environmental contamination.

Ms. MacLean denied that Mr. Erickson had not been told about the indications of a shared environment between the Morins and Jessops. She testified that she discussed them with Mr. Erickson to some extent. She also pointed out that Mr. Erickson had requested a copy of Ms. Nyznyk's evidence at the first trial, which referred to much of the relevant evidence. Mr. Erickson initially acknowledged reading the transcript of Ms. Nyznyk's evidence, but later stated that he only read portions of it, and that he did not recall readings the portions about the evidence of a shared environment. He read all of the preliminary inquiry transcript. He was cross-examined on this point:

Q. And this, sir, in spite of the fact that you claim that from reading her evidence, you came to the conclusion that she went too far in her conclusions. Your concern about her going too far in her conclusions didn't lead you to even bother to read all of her evidence? Pretty extraordinary, isn't it, sir?

A. I was relying on the preliminary hearing in which she testified.

.....

Q. Do you think, sir, as a supervisor of Ms. Nyznyk, if you'd really been concerned about her evidence at the preliminary hearing, you might have said to yourself, well, maybe I'd better see what she said to the jury at the trial? You'd done that?

A. Well, Mr. Sandler was much more specific in terms of what was said. Did I know this, did I know this point, did I know that point, as opposed as what is in the transcript. And I did not know those points that Mr. Sandler raised.

Ms. MacLean was specifically asked whether Crown counsel advised the experts of the laundromat test conducted by the police. She was initially unsure whether they had done so.²¹ She was certain that she and the experts discussed the issue of a common laundromat, and believed that they also discussed the test, since the issues were related. However, she did not have a specific recollection of doing so. Ms. MacLean later felt certain she had discussed the test with Mr. Erickson and Ms. Nyznyk. She had called evidence about the test at the second trial in advance of the expert testimony (thereby making the test an issue at the trial), and she discussed with Mr. Erickson and Ms. Nyznyk issues on which they might be cross-examined.

Ms. MacLean acknowledged that the results of the test were a problem for the Crown (given that they supported the possibility of innocent transfer), but stated that the Crown attorneys did not think that transference through the laundromat was a likely explanation. First of all, Ms. Nyznyk did not think so, an opinion Ms. MacLean said she would prefer over that of the police. Second, Crown counsel did not think it likely that someone would wash an angora or animal hair sweater (as was done in the test) in a washing machine. Finally, there were about 20 washing machines at the laundromat, and it seemed unlikely that the families would end up using the same one. (The laundromat test is revisited later in the context of disclosure.)

²¹ Mr. Scott testified that he did not think he ever disclosed the test to either expert.

Findings

I find that environmental contamination was discussed between police, prosecutors and scientists. The scientists did communicate the opinion that environmental contamination was an unlikely explanation for the fibre findings. The difficulty here is that the non-expert evidence bearing upon environmental contamination was contested at trial; for example, the Jessops and the Morins differed as to the extent of contact between the parties, *i.e.* how extensive was the opportunity for environmental contamination? It therefore became important for the scientists to be clearly told the assumptions upon which their opinions would be based. It also became important for the scientists to clearly understand what assumptions they were being asked to make. A written record prepared by the scientists of their opinions on this issue, together with the evidentiary assumptions upon which those opinions were based, was essential. It would have prevented any misunderstandings between the police, prosecutors and scientists and provided an appropriate way for the defence to understand the scientists' precise position and the underlying assumptions. I find that there was a two-way failure of communication between the prosecutors and scientists on this issue and that the absence of a record prepared by the scientists contributed to this failure.

Having said that, Mr. Cook's opinion, which I accept, is that even taking the contested evidence most favourable to the prosecution, environmental contamination was a sufficient concern so as to negate any ability to draw an inference that the findings demonstrated direct contact between Christine Jessop and Guy Paul Morin at the material time. Mr. Erickson and Ms. Nyznyk should have appreciated that the number and nature of the few fibres found, together with the background circumstances, did not make direct contact more likely than environmental contamination. Their present views were not articulated back then. Mr. Erickson and Ms. Nyznyk demonstrated a lack of scientific rigour or care in the expressions of their opinions about environmental contamination.

M. Alleged Pressure from the Authorities

(i) Alleged Pressure to Influence Opinions

Some evidence was heard by the Commission of attempts by the authorities, primarily Mr. Scott, to influence the findings of Ms. Nyznyk. Most significantly, Ms. Nyznyk alleged that Mr. Scott had pressured her to strengthen her results. Ms. Nyznyk denied that her evidence had been affected by the pressure. Ultimately, she retracted any allegation of wrongdoing by Mr. Scott. Given the public attention directed to this allegation, I intend to address it here.

During Ms. Nyznyk's early evidence at this Inquiry, she described a meeting she had with Mr. Scott, Ms. MacLean, Detective Fitzpatrick and Inspector Shephard, which she believed was prior to the first trial:

A. It was a very — as far as I recall, a very pressureous meeting for myself. The Crown attorneys didn't seem to be very happy with my assessment, or my conclusions, as to the strength I would place on my evidence.

.....

Q. What was the sense that you got as to why pressure was being exerted?

A. That my evidence was not strong enough. My conclusions were not of the kind that would be strong enough. That he expected them to be stronger ... I refused to alter my opinions.

.....

Q. All right. Now, let me ask you this. I take it that by 1985, 1986, you had met in other cases with Crown counsel? Is that right?

A. That's correct.

Q. And had you ever experienced this kind of a pressurized atmosphere before?

A. No, I hadn't.

Q. Had Crown counsel ever asked you to go further than you felt the evidence would bear?

A. No.

Q. Did you feel that was what was being suggested here?

A. I felt that was what was being suggested, yes.

Ms. Nyznyk later intimated that Mr. Scott applied similar pressure at other times. She testified that he was “pressuring and calling all the time.”

Ms. Nyznyk said that in her experience, Crown attorneys had generally acted professionally and had not asked her to change her opinions. This was the first case where she felt that the police or the Crown did not understand her role as an independent analyst.

Although Ms. Nyznyk often referred to pressure from ‘the Crowns,’ she clarified that it was mostly Mr. Scott who exerted the pressure. She said that Ms. MacLean never did anything untoward, and she was not even certain that Ms. MacLean was present at the meeting referred to above. Ms. Nyznyk also testified that neither Detective Fitzpatrick nor Inspector Shephard ever pressured her to strengthen her results.

In cross-examination, Ms. Nyznyk’s evidence began to change:

Q. Do you think, as the impartial scientist, the way you presented yourself in your evidence, that at a minimum, you should have told the defence of an improper attempt to influence your evidence?

A. [Y]es, I guess that would be proper to say, but at that point, it wasn’t really an attempt to influence my evidence. It was trying to find ways to make it firmer. So I don’t know whether I would have imparted that information.

Q. Well, that raises the question — I’m not sure what your evidence is here. Is your evidence that Mr. Scott was trying to get you to express things more strongly than you were prepared to, or is your evidence that Mr. Scott was interested in finding out from you whether opinions could be expressed more strongly by other

people? Which is it?

A. I think it was both.

.....

Q. So Mr. Scott, was he trying to persuade you that you should make stronger opinions, or express stronger opinions?

A. Yes.

In re-examination by Commission counsel, Ms. Nyznyk abandoned any allegation that Mr. Scott improperly pressured her to strengthen her opinions. She testified:

Q. ... Mr. Armstrong was putting certain suggestions to you that in the course of trial advocacy, counsel, whether they be defence counsel or Crown counsel, not surprisingly want to question these witnesses to see the limits of their expert evidence. And this is done every day of the week, Mr. Armstrong was suggesting to you, that counsel obviously want to gauge exactly where the witness is at in his or her expert evidence. Do you remember being asked about that?

A. Yes.

Q. And I heard you respond to Mr. Armstrong by saying that you felt that the probing by Mr. Scott in this case was a little stronger than you'd experienced before; you said that, right?

A. That's correct.

Q. But what I'm asking you is that would you be prepared to acknowledge what I think Mr. Armstrong was effectively putting to you, and that is that even though Mr. Scott may have been pursuing it in a little bit more probing way than you'd experienced before, that he was doing so in a way that was consistent with his professional responsibilities? In other words, he wasn't doing so in an improper way? Do you think that's an accurate way of looking at all of this?

A. Yes, I think so.

Q. So that when you told me way back when, and it kind of seems like light years ago, and when you told some of the other counsel about this pressure that had been exerted by Mr. Scott upon you to make the evidence stronger than it was, is it your evidence that you did not intend to suggest in any way that Mr. Scott was acting improperly in speaking to you in that way?

A. Yes.

Q. All right. Well, now, I expect that Mr. Armstrong and Mr. Scott would be very relieved to hear that now. I guess I have to ask you, were you not aware that the thrust or the tenor of your evidence, when you gave it in response to my questions, seemed to suggest that you regarded this as somewhat improper?

A. No, I wasn't aware of that.

Q. You weren't?

A. No.

Q. When did it first dawn on you that people were regarding your evidence having to do with Mr. Scott as suggesting some impropriety on his part?

A. Actually, this morning.

Q. Is that your evidence, that the very first time that that dawned on you was this morning?

A. Yes, I didn't realize that they're thinking it was inappropriate. That's correct.

Ms. Nyznyk testified that she spoke to Mr. Erickson about the pressure being applied on her. She purportedly called him into the meeting with Mr. Scott and others, earlier described. She stated that Mr. Erickson told the Crown and police that there were limits on the strength of the opinions the CFS could express, and that Ms. Nyznyk could not make her evidence any stronger. Mr. Erickson testified that he did not recall such a meeting, nor did he recall Ms. Nyznyk ever speaking to him about pressure from Mr. Scott. It is something, he said, he would expect to recall had it occurred.

Ms. Nyznyk could not recall telling anyone other than Mr. Erickson

about the pressure until she told her counsel a few days before testifying before the Inquiry.

Ms. Nyznyk was asked whether her untimely complaint about pressure from Mr. Scott was motivated by a letter he wrote in February 1987 to Mr. Erickson. The letter stated, in part:

Dear Norm:

In response to your request of February 18, 1987, I have enclosed a copy of Ms. Nyznyk's evidence at the preliminary inquiry and trial of Mr. Morin. I have also enclosed copies of 3 forensic reports that she provided. Any items provided by the police after May 9, 1985 were done for the purpose of elimination, many at her request. Other items were taken to her for elimination often at her suggestion but could not be analysed because of a variety of expressed pressures of work. Inspector Brown, Det/Sgt. Shephard and Det. Fitzpatrick would be happy to confidentially discuss a number of such instances with you.

Mr. Morin was arrested on April 22, 1985. On May 3, the date that the preliminary inquiry was set, I spoke to you about how long the examination of the hairs and fibres would take. As a result of what I was told it appeared there would be no problem having the work done by the preliminary date of June 24, 25 and 26. Some work was done, but much remained undone.

During the summer of 1985 the police or I spoke often with Ms. Nyznyk expressing concerns about an impending trial for a man in custody. The case was set for the Assizes of September 9 and October 7 but did not proceed. Ultimately the case did proceed on January 7, 1986. I have included a letter dated October 8, 1985 and the attached affidavit relating to problems caused by the failure to complete the examinations. In fact the defence expert, Skip Palenik, came up and viewed what Ms. Nyznyk had found in the fall of 1985. The Crown had to pay for a return visit by the defence expert as a result of additional findings made during the trial.

Needless to say this was a fairly frustrating time period for the police and myself. The officers chased

down any number of leads to try to assist Ms. Nyznyk. We had asked for some demonstrative aids for the trial and were told they could be done. They were not. I opened to the jury with only part of the evidence. To be frank, we were concerned that if we continued to pressure Ms. Nyznyk, the evidence that might be found, would be lost. Some of the vacuumings from the car of the accused have still not been compared to the hair and fibres found at the murder scene.

Ms. Nyznyk admitted that she only learned about the letter a week or so before she began her testimony at the Inquiry. She was initially confident that she advised her counsel about the pressure before she learned about Mr. Scott's letter, but she later conceded that she may not have advised her counsel about the issue until around or after the time she became aware of the letter.

Mr. Erickson testified that there was nothing unprofessional about his dealings with Mr. Scott, and that Mr. Scott never pressured him to change his views. Mr. Erickson further testified that Crown attorneys (and police and defence counsel) sometimes inquire whether a scientist can say more about his or her findings, but he felt that such inquiries were understandable, given the attorneys' limited knowledge. Mr. Lucas concurred that clients of the CFS sometimes ask whether experts can say more about their findings, but he did not interpret that as pressure to overstate an opinion.

Mr. Scott testified that he never tried to influence Ms. Nyznyk's results or pressure her in any way except to get her work done. Ms. MacLean testified that there was no pressure exerted on Ms. Nyznyk or Mr. Erickson, subtle or otherwise, to support the position that Christine Jessop had been in the Morin Honda.

I accept completely Mr. Scott's evidence in this regard. It may well be (as suggested by some of the witnesses) that Mr. Scott and the investigators considered, or took steps, to retain an outside expert who could possibly render a stronger opinion. This involved no impropriety. There was no improper pressure exerted by Mr. Scott on Ms. Nyznyk to overstate her evidence. Her allegation (and her later recantation) reflected adversely on her credibility at this Inquiry.

Having said that, I must add that the evidence disclosed that the

investigators repeatedly telephoned or dropped in on Ms. Nyznyk at the CFS and once attended unexpectedly at her home. The investigators were undoubtedly concerned about Ms. Nyznyk's ability to complete her examinations within the required time frame. They also saw her evidence as important to the prosecution. I also have no doubt that Ms. Nyznyk felt the pressure from Mr. Scott and the investigators to complete her work in time for trial. I do not find that any improper pressure was exerted in this regard. However, the significant time constraints imposed on Ms. Nyznyk were endemic to the CFS and appear to remain a significant problem today. The pressures on Ms. Nyznyk to produce timely findings are discussed later in this chapter in the context of the CFS' workload.

The number and duration of meetings which Ms. Nyznyk and Mr. Erickson attended with prosecutors and investigators prior to the second trial were also explored at the Inquiry.

Mr. Erickson was asked about meeting with Crown counsel and police on eight different occasions prior to giving his evidence in Mr. Morin's case (with some of the meetings lasting several hours). He testified that he did not know whether an unusually large amount of time was devoted to preparation for the case, but denied that it was part of a system wherein the CFS and the authorities were trying to improve the case against Mr. Morin. Mr. Cook testified that it appeared that a lot of time was spent in meetings in the case, when the evidence was relatively simple. Mr. Lucas said he was somewhat troubled by the length of the meetings held in Mr. Morin's case. He pointed out that there was a large volume of material involved, but agreed that it does not take long to tell the Crown that most of the examinations did not show any matches. Ms. MacLean testified that the meetings were held in order to teach her about the hair and fibre evidence so she could lead it in Court. She listed a number of issues which had to be discussed: for example, the general science of hair and fibre examinations, the instruments used in the examinations, the continuity of the hair and fibre specimens, the locations where the specimens were found, and the demonstrative exhibits that could be used.

Mr. Erickson was also asked about the fact that several Crown attorneys and police officers were often present at the meetings. He said that he had never had meetings with three police officers and four Crown counsel before, and did not know why so many people met with him in Mr. Morin's case. Mr. Crocker testified that it was not unusual to meet with so many

people, but it was not the norm. Mr. Lucas stated that he had been involved in meetings with large numbers of people before. Detective Fitzpatrick testified that it did not occur to him that someone might be intimidated to meet with so many authorities at the same time.

There is no evidence that Crown counsel or the investigators acted in any improper way during these meetings. However, numerous, sometimes lengthy, meetings, often involving at least five or six prosecutors and officers, tested the independence and impartiality of the experts. Unfortunately, in some respects, Ms. Nyznyk and Mr. Erickson failed the test.

The relationship between the CFS and the police and prosecutors generally has been raised as a systemic issue at this Inquiry. The overwhelming percentage of work done by the CFS is done at the instance of the authorities. This, and the evidence heard at this Inquiry, compels the creation of measures which enhance the independence and impartiality of the CFS and its employees and protect against bias. These recommended measures are addressed at the conclusion of this chapter.

N. Continuing Involvement of the CFS

(i) Overview

Mr. Crocker was a forensic biologist at the CFS who took part in the latter stages of the second trial and in Mr. Morin's appeal against conviction. He became involved in the trial when he attended in Court, at Mr. Erickson's request, to listen to the testimony given by the experts for the defence. He became involved in the appeal when he was asked to assist the Crown with respect to the application by the defence to introduce fresh evidence. Appeals are normally decided on the basis of the evidence presented at trial. However, in certain exceptional circumstances, reflected in the case law, a party to an appeal may be granted the right to introduce new ('fresh') evidence for consideration by the Court of Appeal.

The defence in Mr. Morin's case sought to have Mr. Cook's evidence admitted as fresh evidence. Mr. Cook swore an affidavit reflecting his views as to the misuse of his study and the insignificance of the fibre findings. The Crown exercised its right to cross-examine him on the affidavit. Mr. Crocker was asked to assist in the cross-examination conducted by the prosecution

and was provided with the affidavit as background information.

As reflected earlier, both Mr. Crocker and Mr. Cook believed that the fibre findings in Mr. Morin's case did not assist in proving that Christine Jessop had been in the Honda, and that the Jackson and Cook study had no application to the case. Mr. Lucas testified that if someone at the CFS learns about a problem with the evidence given by one of their fellow experts they should take corrective steps and inform the prosecution. The evidence at the Inquiry addressed this issue in the context of Mr. Crocker's involvement.

(ii) The Trial

Mr. Crocker attended in Court for the testimony of the defence experts, partly in order to assist the prosecution in conducting its cross-examinations. He did not familiarize himself with the issues in the case in advance, and he had not been told what Ms. Nyznyk and Mr. Erickson had said in their testimony. He did know what the various fibre findings were in the case and that his colleagues believed the various fibres were similar.

Two experts testified for the defence: John A. Reffner and George W. Neighbor. Both asserted that the fibre findings were of no significance to the case. Mr. Neighbor added that the findings might have been the product of random occurrence. He also stated that the existence of a shared environment between the Jessops and the Morins negated the significance of any fibre findings. Mr. Crocker testified before the Commission that he essentially agreed with all of this evidence. But he could not recall if he advised the prosecutors of his agreement with the defence experts, and he acknowledged that he may not have.

Mr. Crocker explained that when the defence experts testified, he had concentrated more on the aspect of their evidence which disputed the existence of similarities between the fibres, as found by Ms. Nyznyk and Mr. Erickson. Mr. Crocker did not believe that his colleagues were wrong about the similarities. He acknowledged that he probably should have advised Crown counsel that, irrespective of the existence of the similarities, the findings had no significance. He was asked about his reaction to the cross-examination of Mr. Neighbor, in which Mr. Smith tried to enhance the significance of the fibre findings:

Q. What do you see, sir, as your obligations, if any, at

that point in time, when you now are sitting in the courtroom, you know enough about the case to know whether a Crown is trying to stretch something or not, you hear a series of questions where you, as a colleague of the two people whose opinions are being stretched, are sitting there listening. Is your obligation to wait for the next recess to say to the Crown: Hold it, you're doing something you shouldn't be doing, and I, as a scientist, insist you correct it?

A. Perhaps I should have. I'm not aware, I can't recall what conversations we had with respect to the evidence, but my opinion has always been, it was relatively thin.

Q. Don't you think that you should have done that, Mr. Crocker?

A. Quite possibly, yes.

Q. Yes. Did you do that?

A. No, I did not, not that I'm aware of, in any case. I can't recall, as I indicated.

Q. Did you at least tell the Crowns, without necessarily insisting they do something about it, did you at least tell the Crowns that they were stretching it? They were trying to take something a lot further than they should be? That they were trying to stretch something in a first degree murder trial?

A. As I said, I have really problems remembering what our interplay was.

Mr. Crocker did not inform Mr. Pinkofsky of his views on the evidence. He accepted that the defence would have loved to have known of them. He denied that he had taken the side of the prosecution.

(iii) The Appeal

Ms. MacLean was assigned the task of conducting the cross-examination of Mr. Cook for the fresh evidence application. Mr. Crocker met with her and one of the Crown's appellate counsel in advance of the cross-examination. Mr. Cook's affidavit and opinions would have been discussed.

Mr. Crocker read the affidavit at or before the meeting. He believed that he told both Crown attorneys that the study did not apply to the *Morin* case, but that it might be useful for educating the jury in one aspect of fibre evidence.

Mr. Crocker again met with Ms. MacLean and appellate counsel at the time of Mr. Cook's cross-examination. He listened to Mr. Cook's evidence. He agreed with Mr. Cook that the fibre findings did not advance the prosecution's case, and that the Jackson and Cook study did not apply.

Mr. Crocker could not specifically recall discussing the study with Ms. MacLean during or after Mr. Cook's cross-examination. He agreed it was logical that he would have, since he was present in order to assist Ms. MacLean, but he asserted that his recollection was flawed. He also pointed out that he had been unsure at the time whether Mr. Erickson and Ms. Nyznyk had misused the study. He had not read the evidence they gave at the second trial, and this limited his ability to respond to Mr. Cook's allegation that the study had been misused.²²

Mr. Crocker initially testified that he told the prosecutors that he agreed for the most part with Mr. Cook's evidence. He later conceded that it was possible he did not:

Q. Now, similarly, sir, if Susan MacLean has no recollection of you saying either during or after the cross-examination, that you agreed with Mr. Cook, either generally or specifically. Is it possible that you didn't express that view to her?

A. Yes, that's quite possible. As I said, I can't recall what happened exactly after the cross-examination, but I don't think I had very much contact with the Crowns at that point.

Mr. Crocker did not recall telling the Crown attorneys that the fibre findings did not help prove that Christine Jessop had been in the *Morin* Honda. He was not certain if he told them the fibre findings did not advance the Crown's case. Mr. Crocker explained that he had been primarily concerned about the use of the study. He also pointed out that he did not

²² Mr. Erickson had also told him that he had not misstated the study or connected it with the *Morin* case.

understand all the factors which were at play in the case:

A. Well, the problem I have in my own mind is in knowing where these fibres, how they were brought about, what had been said about them, all of the environmental factors that Mr. Cook had brought up. There were certain things in his cross-examination that were brought to his attention with regard to the police handling, their attendance at various scenes, so at that point, I wasn't sure how all these factors interrelated, because I wasn't aware of all the factors of the case itself. I was merely there to listen to what Mr. Cook had to say, and on that basis, I could generally agree with him, yes.

Mr. Crocker ultimately acknowledged that he had no independent recollection of exactly what he said to Ms. MacLean and appellate counsel. He also conceded that he may not have expressed his views clearly and forcefully:

A. I'm just saying that my recollection, had I said something, may not have been as understandable as it may have been. I do believe I brought forward the fact that the study did not apply as an overview of the case, but I may not have been forceful enough in bringing that to their attention, since they made no notation of that fact.

Mr. Crocker knew from the Crown's jury address (much of which was read out during Mr. Cook's cross-examination) that much significance had been attributed to the fibre findings at trial. He accepted that he probably should have forcefully intervened and advised the prosecutors that Mr. Cook was correct. He also accepted that he should have put his views down in writing.

Ms. MacLean testified that when she met with Mr. Crocker in advance of the cross-examination, he did not say that he agreed with Mr. Cook's affidavit or that there was no correlation between the study and the case. Ms. MacLean's notes of the meeting do not reflect any such information. Ms. MacLean further testified that when Mr. Crocker attended for the cross-examination, he never said that the Crown had misused the study or that he agreed with Mr. Cook's evidence. He simply stated that he disagreed with Mr. Cook that the examinations should never have been

conducted at all. Mr. Crocker agreed that that issue was probably discussed.

Ms. MacLean conceded that she never asked Mr. Crocker for his views on Mr. Cook's fresh evidence. She was asked why she did not:

Q. Do you find it remarkable, put it this way, that having heard and read, having read and heard in that order, I suppose, the evidence of Mr. Cook with the reputation that you understood he came with, in an area that had been used at trial and in particular, his writings had been used. Do you find it remarkable that in those circumstances you didn't ask the expert that you were consulting, well, what do you think of what he has to say?

A. Well, I just don't remember discussing it at all, it just wasn't — didn't seem to be an issue that I was addressing. It was basically, what does he mean? Not, what do you think, but what does he mean? And what his reputation is, is he likely to be fair, or just — I guess the word "hired gun" was used, whether he was or wasn't, which he wasn't.

Q. And were you so into process that you weren't really worried about the validity of what he was saying, but just the process? Is that why you didn't ask Mr. Crocker well is what he saying valid, or not?

A. No. Because — no, no, no. Mr. Crocker — what I'm saying is, we already had the evidence of Mr. Erickson and Ms. Nyznyk on what the study meant at the trial. And my understanding was that was the evidence the Crown would be relying upon, subject to this fresh evidence issue. The role that Mr. Crocker was playing wasn't to give me another opinion about this whole issue, he wasn't being consulted, well, what evidence would you have given if you were asked the same questions.

That's wasn't the purpose at all. It was simply, I don't understand what Mr. Cook's saying here, what is he saying, or what is the meaning? And if something technical comes up, can you assist me?

Q. So this chap comes all the way in from England to undermine the evidence of Nyznyk and Erickson, and

you never think to ask Crocker whether what he's saying as a whole, does that or not?

A. No. I didn't raise that issue with him. You're right, I probably should have, but it didn't come up. It wasn't that — wasn't sort of his function in this.

Mr. Crocker agreed that he attended the cross-examination to act as a resource in case something new arose in a technical area. The CFS also had an interest, since Mr. Cook was taking issue with its work.

(iv) Findings

Having regard to the totality of the evidence, I cannot be satisfied that Mr. Crocker communicated his views to Ms. MacLean or to appellate counsel. If he did not, he should have. A scientist, whose role it is to assist the prosecutor either at trial or on appeal, must appreciate that this role involves not only assisting the prosecution in structuring a response to the defence evidence (which is not inappropriate), but advising the prosecutor when the defence evidence has merit. Further, this role may involve advising the prosecutor that the prior testimony offered by the Crown's own witnesses (even if they came from the CFS) was flawed. Independence and objectivity require no less. Further, such a role may not necessitate a full review of all the forensic issues in the case. However, it may involve (and it did here) a need to more fully familiarize oneself with the issues in the case.

Ms. MacLean was chosen to cross-examine Mr. Cook on the fresh evidence application, given her familiarity with the hair and fibre evidence. Her preparatory notes reflected "DON'T UNDO GOOD STUFF FROM TRIAL." It is now clear to Ms. MacLean from having read a summary of Mr. Cook's evidence before the Inquiry that the Jackson and Cook study should never have been introduced into evidence at all or should have been suitably qualified by distinguishing it from the facts of the *Morin* case. However, Mr. Cook said virtually the exact same thing during his testimony on the fresh evidence application. It is likely that her view of Mr. Cook's evidence was coloured by her involvement in the prosecution of Guy Paul Morin. This may have prevented her from seeing just how flawed the Crown's approach to the study had been at the second trial. If Mr. Crocker failed to communicate his views to Ms. MacLean, this may have contributed to Ms. MacLean's inability to accurately and objectively assess Mr. Cook's evidence.

The obligation of Crown appellate counsel confronted with fresh evidence which reflects adversely upon the prosecution's case at trial is a related issue, which is addressed later in this Report.

O. Contamination

(i) Introduction

The evidence at this Inquiry revealed that fibres relating to the Morin case had been contaminated while they were in the possession of the Centre of Forensic Sciences. As a result of these revelations, the Centre retained an independent forensic analyst, Thomas Hopen, of MVA Inc., to examine and report on the contamination. On September 30, 1997, Mr. Hopen's Report was filed with the Commission. It read, in part:

Based on the examinations and analyses conducted, over fourteen (14) purplish-pink animal hairs identified as 'contamination fibres' were indistinguishable from purplish-pink animal hairs identified as 'case fibres', and in the opinion of the undersigned, could have originated from the same source.

That same day, Dr. James Young, the Assistant Deputy Solicitor General, Public Safety Division, issued a press release. It stated, in part: "The review also confirms that the fibre evidence in the Morin case was contaminated from the outset."

Dr. Young's concession is not made by some of the CFS witnesses who testified at this Inquiry. Though the contamination within the Centre is conceded, they question whether it affected the fibre findings in the Morin case. This issue is addressed below.

(ii) Discovery of the Contamination

Shirley Stefak, a CFS technician, was the first person to discover the contamination. Just before the first trial, the prosecutor(s) asked Ms. Nyznyk if she could find more comparisons for use at trial. Ms. Nyznyk asked Ms. Stefak to re-examine the tapings from Christine Jessop and the Honda, as well as the slides previously mounted. She asked Ms. Stefak to look for red

polyester or animal hair fibres in particular, since those were types respecting which she had already found positive comparisons. Ms. Nyznyk wanted someone to look at the tapings with a 'fresh eye.'

When Ms. Stefak re-examined the tapings, she very quickly observed obvious contamination, visible to the naked eye, on both the Jessop and the Honda tapes.²³ Ms. Stefak mounted one or two of the contaminants from each set of tapings and microscopically verified that they were red animal hair fibres. Though Ms. Stefak could not recall exactly when she first discovered the contamination, we know the request came from Ms. Nyznyk just prior to the first trial, which commenced on January 7, 1986. It is clear that her discovery of the contamination took place in late 1985 or early 1986, and certainly before Ms. Nyznyk began testifying on January 22, 1986. This timing later becomes important.

(iii) Reporting the Contamination to Nyznyk and Erickson

Ms. Stefak was troubled by the contamination. It was a "pretty frightening thing to find. It's what we try to avoid at all costs in trace evidence." She immediately reported her discovery to Ms. Nyznyk. She returned the tapings and pointed out the areas of contamination. Ms. Nyznyk examined the tapings and confirmed that they had indeed been contaminated. Ms. Nyznyk advised Ms. Stefak that she did not believe that the contamination had affected her findings, because she would have noticed it, had it been present during her own examination. Ms. Stefak accepted this, believing that any trained person would have noticed the contamination. Ms. Stefak regarded it to be Ms. Nyznyk's responsibility to report the contamination to Mr. Erickson, their section head. She also assumed that Ms. Nyznyk would want to further investigate the extent of contamination which was present.

I pause here to note the obvious. Even if the contamination had not affected Ms. Nyznyk's findings (a point later addressed), it was nonetheless deserving of urgent attention: What if the defence wished to conduct further

²³ Ms. Stefak observed what looked like red animal hair fibres on the exterior of the tapes, adhering to the sticky areas of the tapes that had curled up, and on wedges of the tapes that had been previously cut in order to remove fibres. She believed she also saw one red animal hair fibre adhering to the acetate sheet in which the tapings were stored.

examinations of the tapings? What if the tapings were presented as original evidence for the jury? How had the contamination occurred within the Centre and could other original evidence in other cases be contaminated? What quality controls were in place to prevent future contamination? What about the prosecution's request that the tapings be further examined for additional fibre comparisons?

Mr. Cook testified that he would have followed up any discovery of contamination with an investigation into how it could have occurred and whether any other cases had been affected. He would have wanted to know whether the contaminants matched the incriminatory fibres. He would be very concerned if evidence of contamination was ignored.

Ms. Nyznyk testified that she told Mr. Erickson about the contamination. She also assured him that the contamination had not affected her original examination. Ms. Stefak testified that Mr. Erickson spoke to her about the contamination a few days after she told Ms. Nyznyk about it. Ms. Stefak told him everything she had discovered, and Mr. Erickson said that he would take care of it. Ms. Stefak, Brenda Scheffel (another technician) and Ms. Nyznyk also testified that after the contamination was first discovered, it became the topic of local gossip at the CFS. Ms. Scheffel thought that everyone in the fibre unit heard about it.

At this Inquiry, Ms. Nyznyk did not initially reveal that there had been any in-house contamination at the CFS. Similarly, Mr. Erickson did not initially reveal that there had been in-house contamination or that he had learned of it by 1986. The sequence of the testimony before me is of importance.

Ms. Nyznyk was the first witness to testify in Phase II of this Inquiry — the forensic evidence phase. Her testimony was heard on April 7, 8, 9, 10 and 14, 1997. The Commission had no evidence in its possession at that time concerning contamination at the CFS. Nevertheless, counsel for the Jessops, Mr. Reich, explored the issue with Ms. Nyznyk in systemic terms:

Q. Is there any chance ... that a person handling a garment, or perhaps a police officer who enters a room and is near a garment, could pick up a fibre, walk to the next room, where, for example, the suspect's garments would be, and accidentally deposit one of the microscopic fibres on the other garment?

A. It's possible.

Q. Did that concern you at the time?

A. No.

When Ms. Nyznyk was recalled some time later to testify about the in-house contamination (once it had been exposed), she explained that she forgot about the issue when responding to Mr. Reich's questions. She was confident that her initial examination had not been affected by contamination.

After Ms. Nyznyk testified for the first time, the Commission obtained further documentation from the CFS. One of the documents was a report by Ms. Stefak (as requested by Mr. Erickson), dated February 5, 1991, and entitled "Summary of Textile Examinations." It showed that she had examined the Morin-related tapings at Mr. Erickson's request *between the first and second trials*, noting the extensive contamination of those tapes. The Summary also contained this entry:

[T]hese fibres also appear to be contamination fibres on the tapes; other, generally similar, red animal hairs have been removed (and considered as possible contamination) at an earlier date (1985-1986).

Of course, Ms. Stefak's report not only revealed the contamination of the tapes (previously unknown to the Commission), but raised the additional possibility that the contamination had been discovered as early as 1985-1986.

Mr. Erickson first testified before the Commission on April 14, 15 and 16, 1997. He was asked whether there was any contamination issue in respect of the *Morin* tapings. He responded that he was asked by the prosecution to re-examine the tapings between the first and second trials. When the tapings were returned to the CFS, he discovered the contamination himself. He later directed Ms. Stefak to re-examine the tapings. Why he would do this in the face of this contamination is a matter which I later address. In 1991, Ms. Stefak informed him of her findings. He did not disclose her report to the prosecution or to the defence. He simply explained to the prosecutors that the tapes could no longer be examined because they had been handled by a number of people. (The serious difficulty with this explanation is addressed below.)

Mr. Erickson denied that Ms. Stefak's report, an excerpt of which is set out above, suggested that the contamination had been previously discovered in 1985/1986. According to him, Ms. Stefak's comment only meant that the red animal hairs had been removed in 1985/1986, not that contamination had then been identified.

Mr. Erickson's evidence was not completed on April 16, 1997. To accommodate his schedule, his testimony was set to resume on April 29th.

In the interim, Mr. Levy, counsel for Messrs. McGuigan and Smith, received an anonymous letter which read:²⁴

Dear Mr. Levy:

With respect to the Guy Paul Morin inquiry there are some things you should know.

Although Stephanie Nyznyk was in charge of the fibre examinations for this case she delegated much of the initial search of the articles for fibres to a contract employee named Lynn Sedgewick who had come from an anthropology or archaeology program at Queens or University of Toronto around that time (circa 1985).

Shirley Stefak has said she observed Lynn Sedgewick handling the items in the Morin case while wearing a red sweater but no lab coat. Shirley also said that she informed Norman Erickson of her strong concerns about this at the time.

As you can see, it was not only a matter of the weight to be placed on this evidence. The fibre evidence was suspect from the very beginning. You must speak with Lynn Sedgewick to get to the bottom of this.

I hope Shirley fully discloses these facts herself but if she does not I will consider coming forward but my testimony would only be hearsay.

Also in the interim, Ms. Stefak spoke to Dr. Ray Prime, the present Director of the CFS. She expressed the concern from reading the newspaper

²⁴ I can place no reliance upon an anonymous letter for its truth. It is noted here because it contributes to the narrative and explains the investigation which followed.

accounts of the Inquiry that the information about the contamination did not appear to be coming out. On April 29, 1997, Mr. Sandler, Commission counsel, interviewed her about the matters now raised on the evidence. He then re-examined Mr. Erickson, referring to Ms. Stefak's report:

Q. What did you take, when you read these notes, when she said: "Considered as possible contamination" and she says: "At an earlier date, 1985 to 1986" ... What was in your mind, when you see that note?

A. Well, the only thing I can think of, after the tapes have been originally examined, the appropriate fibres taken off, then there's been some possible form of contamination.

Q. But we're talking about 1985 to 1986, so what did you take from that?

A. That that contamination could have occurred in 1985 or 1986 ... The original fibres were taken off in April of 1985 ... So we've got from April of 1985 till 1986 that they potentially could have become contaminated.

Q. We know that the first trial took place in 1986, am I right?

A. Yes.

Q. And it would appear that these notes would suggest that contamination may have occurred back prior to, or during the time frame of the first trial. I mean, isn't that what the notes say?

A. That would indicate that, yes.

Q. Right, so what reaction, if any, did you have when notes from a well-trained technician told you that this contamination may have occurred back prior to, or during the first trial?

A. Well, I felt that, as I said, the initial removal of those fibres were done in a proper manner, taken off, and then subsequent to that, there may have been some contamination. But I felt that the original work done by Ms. Nyznyk and Ms. Scheffel, related to fibres that

they had removed under the tapes, and they weren't a form of contamination.

Q. Well, let's just explore this a little bit, because I'm going to suggest to you that Ms. Stefak was asked by Ms. Nyznyk, back prior to the first trial, to look at these tapings with a view to seeing whether or not there was anything on the tapings that might have been missed by Ms. Nyznyk.

A. Revisited in 1986.

Q. Prior to the first trial, I'm suggesting.

A. Yes.

Q. All right. Did you know that back then?

A. Yes.

Q. You did? All right. I'm going to suggest to you that Ms. Stefak examined the very same tapings that she's now reporting on in 1991, back in late 1985 or early 1986, before the first trial. Isn't that so?

A. I believe she examined them in 1986.

Q. You do? And I'm going to suggest to you that back then, she reported to Ms. Nyznyk that these tapings were contaminated, and accordingly could yield no meaningful further results.

.....

A. I don't recall that.

Q. Well, is that possible?

A. It's possible, yes.

Q. I'm going to suggest to you that — I'll ask you flat out — didn't Ms. Stefak or Ms. Nyznyk advise you back prior to the first trial, that there was this contamination issue that had arisen in connection with the tapings, back prior to the first trial? I'm not interested in 1991/1992.

A. Again, I don't recollect that conversation. I'm not saying she didn't, but I don't recollect that conversation.

Q. You don't. So, is it possible that back prior to the first trial, people at the Centre of Forensic Science brought to your attention, that however — and again, I'm not interested right not in whether the contamination occurred during the tapings, after the tapings, whatever, but is it possible that somebody brought to your attention, prior to the first trial, that these tapings were contaminated, and therefore could yield no further meaningful examination results?

A. That's possible.

.....

Q. [Y]ou recall that there was a concern, back in 1986 about how this contamination had occurred within the centre?

A. Yes, that could be.

On all the evidence, there is no doubt that the contamination was discovered by early 1986 and that Mr. Erickson was told about it at the time.

(iv) Investigative Responses to Known Contamination

Ms. Nyznyk told me that she found the contamination “disturbing” and it became clear to her, whenever the contamination had taken place, that it had occurred in some way *within the Centre*. Nonetheless, it never occurred to her to investigate the cause or to check other files to see if it had spread elsewhere. She could offer no explanation why she failed to do so.

Ms. Nyznyk was asked whether she ever compared the slides of the contaminants (prepared by Ms. Stefak) to the slides respecting her original findings. She did not recall doing so, and had no notes of doing so. At one point, she stated that it would have been logical to do so and, indeed, she assumes that she did. She then agreed that the only reason she would do so was out of a concern that the contamination had affected her original findings — a concern she claims she did not have. This, and many other inconsistencies in her evidence, cannot be reconciled. Some of the problems

in the quality of her testimony might be explained by the passage of time and her present ill-health. Unfortunately, however, not all of these problems can be explained away. In the result, it is difficult to accept her unsupported evidence on any contested issue.

Ms. Nyznyk made no notes of the contamination she herself saw. Ms. Stefak offered Ms. Nyznyk her 1985/1986 rough notes and offered to prepare further notes of the contamination. She testified:

When I returned the tapings to Stephanie Nyznyk, I asked her if she would like me to make notes for what I'd seen in terms of the contamination, and she told me no, that she would look after it herself.

This was similar to Mr. Erickson's reaction to Ms. Stefak that he 'would take care of it.'

There is no evidence that Ms. Nyznyk or Mr. Erickson did anything about the contamination when it was reported to them. They told no one outside the CFS. Ms. Nyznyk had no interest in documenting the contamination or retaining any documentary record of the contamination in her file. She agreed that, normally, whatever notes a technician makes, would be placed in the analyst's files. Slides which Ms. Stefak prepared to show the contaminant fibres were not located in Ms. Nyznyk's files. There is no evidence that Mr. Erickson, as the unit's section head, documented the contamination in any way or advised the Director of this serious problem within the Centre.

Mr. Erickson speculated before me as to the causes of the contamination. He raised the possibility that the police had caused the contamination by storing items together in the same box, but later evidence demonstrated that the samples had to be contaminated either entirely or, at least, largely while at the CFS. He acknowledged that the contamination could have occurred at the CFS:

Q. [O]ne thing it could have been is this contamination could have occurred at the time of the examination at the Centre of Forensic Sciences, by Ms. Nyznyk.

A. That's a possibility, but, as I say, I don't know.

He was cross-examined about his position:

Q. In other words, no real effort seems to have been made to determine what cause there could have been of the contamination. Am I right?

A. That's correct.

Q. No investigation at all. You made assumptions that there was something else in the box, that someone was fiddling around with it. That the hairs fell off it, and that someone opened up these envelopes that these animal hair fibres were in, and managed to scatter them in the envelopes. That seems to be what you're saying.

A. That's a possible explanation. I don't know, Mr. Lockyer.

Ms. Stefak stated that people in the fibre unit speculated about possible causes of the contamination. Someone suggested that it might have been caused by a technician, Lynn Sedgewick, wearing a red sweater during the initial examination of the trace evidence. Ms. Scheffel raised this possibility with Mr. Erickson some time between June 1986 (when Ms. Sedgewick left the CFS) and November 1989 (when Ms. Scheffel departed).

Ms. Scheffel testified that Mr. Erickson responded to her suggestion by stating that he did not know how to get hold of Ms. Sedgewick. She was a little baffled by this response since she was sure that the CFS could find some way to get in touch with Ms. Sedgewick. She could see that the subject was a touchy issue. She also assumed that Mr. Erickson was just having a bad day, and was dealing with it in his own way. But she did lose some confidence in Mr. Erickson as a result of his response.

It turned out that Mr. Erickson did contact Ms. Sedgewick, as well as Ms. Scheffel (who had left the CFS). He telephoned them in 1990 or 1991 to determine whether either ever owned a red angora sweater. Each confirmed that Mr. Erickson had contacted them about their sweaters. Indeed, Mr. Erickson took a sample of Ms. Scheffel's fuzzy purple sweater. Mr. Erickson was asked about this:

Q. It now seems, sir, that you did conduct an investigation to see where these contaminant, as you

call them, fibres?

A. In terms of those two people handling them, but I did no investigation in terms of the fur samples that were in the box.

Q. Why didn't you tell us about this, sir? Why didn't you tell us about calling these two women to see if they had red angora sweaters, when I was directing questions to you that made it very clear I would like to have had that information?

A. Well, I apologize if I didn't tell you that. I thought you were referring to the contamination within the boxes.

Findings

This investigation, if it can be described as such, was too little — too late. I find that from 1986 to 1991, Ms. Nyznyk and Mr. Erickson demonstrated no real interest in determining how or why the contamination occurred. They also deliberately chose not to disclose this contamination to anyone outside the CFS.

(v) Further Examinations in 1986 Despite the Contamination

The first trial commenced on January 7, 1986. While the trial was in progress, and before she testified on January 28th, Ms. Nyznyk continued to work on fibre comparisons. She issued reports on January 13 and 17, 1986. Several new findings of fibre similarities were reported after the contamination had been identified. The question therefore arose whether these fibres had already been mounted on slides before the contamination occurred or whether they were removed from tapings after the contamination was identified.

The evidence on this point is unclear. Ms. Stefak testified that at least three fibres ultimately found to be similar by Ms. Nyznyk were identified on or after January 6, 1986.²⁵

²⁵ They were one purple/pink animal hair fibre from Christine Jessop's sweatshirt, one purple/pink animal hair fibre from the Honda, and one dark grey animal hair fibre from Christine Jessop's turtleneck.

Ms. Nyznyk testified that no fibres were removed from the tapings after the contamination was known. Ms. Stefak similarly believed that all the fibres she identified were removed before the contamination was discovered. She could not be 100 percent certain of this, but felt that she would not have re-examined contaminated tapings. (Of course, she reluctantly did re-examine contaminated tapings years later at Mr. Erickson's direction.)

Both Ms. Nyznyk and Ms. Stefak were questioned about Ms. Stefak's examination notes dated January 6, 1986. Some of the slides listed in the notes contained fibres ultimately found to be similar by Ms. Nyznyk. Ms. Stefak testified that it did not necessarily follow that the slides were mounted on that day. She said that, normally, tapings would be screened for interesting fibres, which would be mounted, but not identified until a later date. The fibres could, therefore, have been mounted a number of days before, and only identified on January 6, 1986. The fibres could also have been mounted after that date, as tapings were re-examined and the results noted on the bottom of the same page. Ms. Stefak stated that, during that period, the analysts and technicians did not record the date that fibres were mounted, and were not that careful about note taking in general. Ms. Nyznyk agreed that the mounting dates could not be determined from the notes. At the second trial, Ms. Nyznyk twice reflected that she mounted other fibres on April 29, 1985, by referring to notes so dated. It was suggested to her that this demonstrates that the notes do reflect the date of mounting. She replied that April 29th was the date on which she examined the fibres in question. But she was wrong to testify at trial that April 29th was the date when the fibres were mounted because, as she later said, it would have been physically impossible to mount all the fibres listed on the April 29th notes on one day. Ms. Stefak agreed and made the same observation in relation to the January 6th notes.

Ms. Nyznyk was also cross-examined about the fact that Ms. Stefak's notes of January 6, 1986, refer to slides not listed in Ms. Nyznyk's notes of her original examinations in 1985. The new slides, in turn, hold fibres which do not appear to correspond in colour or type to the fibres on the old slides created by Ms. Nyznyk. It was suggested that this indicates that Ms. Stefak created the new slides from additional fibres removed from the various tapings and not from the old slides. Ms. Nyznyk countered that Ms. Stefak may have simply created new slides from fibres that had been mounted, but not previously noticed on the old slides. This is sometimes done when fibres are found in clumps on slides, and the examiner wants to remount them individually to spread them around. Ms. Nyznyk further testified that she

would have expected Ms. Stefak to remove many more fibres than are listed in the January 6th notes if she had examined the tapings anew. Ms. Nyznyk acknowledged, however, that she had directed Ms. Stefak to concentrate her search on red animal hair fibres. Therefore, Ms. Stefak might have been motivated to remove relatively few fibres.

Findings

I cannot be satisfied that additional fibres, cited in Ms. Nyznyk's trial testimony, were extracted from the tapings after the contamination was known to her. The evidence is inconclusive. We do not know precisely when the contamination was discovered. This is due to the failure to document the contamination properly. We also do not know precisely when the relevant fibres were extracted from the tapings and mounted, as opposed to when they were microscopically compared and identified as significant. This is due to the inadequacy of the records kept of work done by the analysts and technicians. Of course, the tapings may have been contaminated well before Ms. Stefak's discovery, in which event all Ms. Nyznyk's findings were tainted anyway. I will return to the evidence bearing upon the potential causes and timing of the contamination later in this Report.

(vi) The Re-Examinations in 1990/1991

I have earlier noted that in 1990/1991, Ms. Stefak re-examined tapings and vacuumings relating to the *Morin* case. This was at Mr. Erickson's direction. Her re-examination yielded further evidence of contamination.²⁶ Her findings were recorded in a "Summary of Textile Examinations," dated February 5, 1991. This re-examination must be reviewed in some detail since it raises additional issues of importance to this Inquiry.

Ms. Stefak found contaminant fibres on the undersides and upper surfaces of the tapings. She concluded that the fibres on the undersides were contaminants because she found similar, obviously contaminant, fibres on the upper surfaces and curled edges of the tapings.

²⁶ The re-examination also produced what were arguably exculpatory results relevant to the case. These results were never disclosed to the defence or, indeed, to anyone else.

Ms. Stefak found contaminant fibres of a wide range of colours and types. Included amongst them were red wool fibres and red animal hair fibres. Some of these red fibres were located on the undersides of the tapings. Ms. Stefak noted in her summary that no other "colour/type" of fibres occurred in significant amounts on both the tapings associated with Mr. Morin and the tapings associated with Christine Jessop.

Amongst others, Ms. Stefak found the following contaminant fibres:

1. On the tapings of the Honda,²⁷ one pink/red animal hair fibre on the underside and 30 pinky/red animal hair fibres on the outer surface;
2. on the tapings of Christine's clothing and personal effects, one red animal hair fibre on the outer surface;
3. on the tapings from the Honda, 31 dark red wool fibres;
4. on the tapings from Christine's clothing and personal effects, six dark red wool fibres on the underside and 13 dark red wool fibres on the outer surface.

Ms. Stefak also found red animal hair contaminant fibres in the vacuumings. Only some of the vacuumings had been opened and examined previously by Ms. Nyznyk. Only the previously opened vacuumings appeared to be contaminated. This raises the obvious concern that the contamination was related, in some way, to the examination process.

Ms. Stefak did not microscopically compare any of the contaminants to the fibres found to be similar by Ms. Nyznyk. She could state, however, that they were essentially the same colour and type. Further, Ms. Stefak did a microscopic comparison of 38 of the red wool contaminants found on the tapings from Christine Jessop's clothing and from the Morin Honda. She found that 12 fibres from the clothing were microscopically similar to 19

²⁷ Ms. Stefak examined five of the 15 tapings. She did not re-examine the taping on which she had found a purple/pink red animal hair in January 1986. This fibre was included in Ms. Nyznyk's findings.

from the Honda.

The prosecution had asked Mr. Erickson to re-examine the trace evidence in Mr. Morin's case in advance of the second trial. Mr. Erickson testified that after he observed the contamination on the tapings he did not "want to undertake any comparisons" with them. Questions were directed to him as to why, therefore, he had Ms. Stefak re-examine the contaminated fibres. Did he direct the re-examination of the fibre evidence to potentially obtain further evidence to be used in the Morin prosecution?

Mr. Erickson stated that after observing the contamination he advised Mr. Scott that nothing more could be done with the tapings, since they had been handled by a number of people. He did not disclose the existence of the contamination. He explained that he asked Ms. Stefak to conduct the re-examination as a sort of "academic exercise"; he wanted to determine what the contamination was, and demonstrate why it was not advisable to revisit tapings that had been taken out of the laboratory and later returned for re-examination; he thought that it could be a useful lesson about contamination and the value of re-examinations.

Ms. Stefak could not say why Mr. Erickson asked her to re-examine the tapings. She was not even sure that she ever understood why he made the request. She reminded him that the tapings were contaminated (he did not seem to remember), and told him she was uncomfortable with the assignment:

Q. Now when Mr. Erickson asked you to do further work on the fibre tapings, I take it, on the case — right? — did you have any concerns that you expressed to him?

A. I had a lot of concerns because I knew the tapings were already contaminated, and I know that I would indicate to him that there wasn't any point in doing any further work on the tapings because of the contamination.

Q. All right. Did you want to do the further work?

A. No.

Q. Did you tell him that?

A. Yes, I told him I didn't really want to have anything more to do with it.

Mr. Erickson denied that Ms. Stefak ever expressed any discomfort connected with his request. I accept Ms. Stefak's evidence in this regard.

Ms. Stefak did indicate that she was prepared to assume, despite her discomfort, that Mr. Erickson, a careful and conscientious worker, had a legitimate reason for his request. She was reluctant to believe that he was searching for more evidence to incriminate Mr. Morin. Ms. Stefak reflected that Mr. Erickson might have wanted her to identify the type, quantity and location of the contamination. Unfortunately, this explanation is somewhat problematic if one examines the five things listed in her summary which Mr. Erickson instructed her to look for:

1. Any possible fibres in common between the exhibits of the accused and the exhibits of the deceased;
2. any additional red polyester or red animal hairs on all tapes and vacuumings;
3. any golden/orange or golden/yellow polypropylene or acrylic fibres similar to the Honda seat covers on the tapings from the deceased;
4. any light blue acrylic fibres similar to Christine Jessop's sweatshirt on the tapings from the accused;
5. dark blue acrylic fibres similar to the toque. (This last request was later abandoned when it was discovered that the toque did not originate from either Mr. Morin or Christine Jessop.)

It was suggested to Ms. Stefak that the nature of the examinations requested by Mr. Erickson indicated that he was searching for additional evidence in Mr. Morin's case. She initially seemed to agree:

Q. All right, so leaving aside number five, and directing my questions to numbers one to four, these sound like investigative requests referable to the Guy Paul Morin case. Am I right?

A. Yes.

Q. And further, they sound like investigative work to determine whether any additional evidence relevant to the case can be generated from these exhibits. Am I right?

A. Yes, it looks like that.

Q. I mean, in fairness, you indicated that a logical reason for examining materials already known to be contaminated, could be to ascertain where the contamination is, and basically, document the contamination; right?

A. Mm-hmm.

Q. But I guess what I'm suggesting to you is, that if one looks at what you're looking for, the four items that you're looking for, it appears that we're beyond that and you're being requested to look for potential evidence relevant to the Guy Paul Morin case. Am I right?

A. Yes, we're looking at fibres that go beyond the contamination.

Later, however, Ms. Stefak noted that the examinations requested could only be characterized as a search for further evidence if Mr. Erickson intended to include the results in a report for trial. Requests three and four might have been made in order to check the quality or accuracy of the earlier examinations conducted by Ms. Nyznyk. The problem with that position was that the related, earlier examinations of Ms. Nyznyk had not produced any findings. Finally, Ms. Stefak pointed out that, as far as she knew, no further tests were done on any of the contaminant fibres after her report was made, and she suggested this was evidence that Mr. Erickson was not trying to prove additional matches. On the other hand, she had already made it clear in her summary that she would not do any more work on the contaminant fibres.

In re-examination, Mr. Erickson was specifically asked about the requests he made of Ms. Stefak:

Q. Doesn't it sound like the kind of request that's

being generated to produce evidence in a criminal case?
I mean can one read that any other way?

A. Yes, we were looking at it in that light.

Q. Of course. I mean, this surely wasn't an academic exercise, simply to determine if there was contamination on the tapes. One doesn't engage in these comparisons simply to determine whether the tapes are contaminated.

A. But we knew the tapes were contaminated by our first observation.

Q. Of course.

A. And then we proceeded to look at what the contamination was. What was on the tapes in terms of fibres.

Q. So, I guess the question that I have for you, is if you know, as you've said, as of 1986 that the findings to be generated from contaminated tapes are valueless, why are these comparisons even being requested in 1990 and early 1991?

A. Again, I was just interested in what were the fibres on the tape.

Q. Just interested?

A. Yeah, in terms of reporting that when you get materials back to examine or re-examine, the exercise was that you can't do that sort of exercise, because of the contamination. And I was interested in what the contamination was.

Q. So the way to find out what the contamination was, is to compare fibres from the accused, the fibres of the deceased, looking for additional red polyester, additional gold yellow seat covers, acrylic blue — that's the way?

A. Yes.

Ms. Nyznyk testified that she was told during the second trial that the re-examination was conducted as a search for different types of fibres than

the red contaminants. She did not recall who told her that. She testified that, after the contamination had been discovered, she would not have conducted a re-examination for any type of fibre because other types of fibres might be contaminants as well. She never expressed this concern to anyone because she did not “have a say in it” and she learned of the re-examination well after it was done.

Findings

I am unable to accept that Mr. Erickson requested the work outlined by Ms. Stefak merely as an “academic exercise.” The things Ms. Stefak was instructed to look for could only relate directly to the issues at the pending Morin trial. Ms. Stefak’s reluctance to do the work was fully justified. Perhaps Mr. Erickson was of the view that the contaminant fibres could be isolated and that further useful findings could be extracted from the tapings. Ms. Stefak’s unequivocal findings ended that endeavour.

(vii) Non-disclosure of the Contamination to the Prosecutors

Ms. Nyznyk and Mr. Erickson did not disclose the in-house contamination to the prosecution (or the defence) at the first trial or prior to or during the second trial. Mr. Cook testified that if he became aware of any real danger of contamination in a case, he would immediately inform all the parties involved. Mr. Lucas stated that Ms. Stefak’s 1990/91 summary of her findings should have been disclosed. Mr. Crocker testified that he would have disclosed Ms. Stefak’s summary.

Mr. Erickson initially stated that he failed to disclose Ms. Stefak’s summary because he felt it did not further either the Crown or the defence case. He later denied that he made a conscious or deliberate effort to suppress the information. He also denied that he was concerned that the disclosure would embarrass the CFS or expose any inadequate work by Ms. Nyznyk. He had confidence in the initial work done. He conceded that, although the contamination was unlikely to have affected Ms. Nyznyk’s work, it ought to have been disclosed.

Like Mr. Erickson, Ms. Nyznyk acknowledged that she never disclosed the existence of the contamination to either the prosecution or the defence. She believed that she just forgot about the issue, confident that the

contamination had not affected her findings. She denied that she had been embarrassed either for herself or for the CFS.

Ms. Nyznyk accepted that the prosecution and defence were entitled to know about the contamination so they could make their own assessment of whether it was significant to her findings. She also accepted that she had been obliged to advise the Crown and defence of any possibility that the contamination affected her findings.

Mr. Erickson had the full opportunity to disclose the contamination to prosecutors in any one of a number of meetings held prior to trial. He did not. Nor did Ms. Nyznyk. More disturbing, the prosecutors specifically raised the issue of contamination with Ms. Nyznyk and with Mr. Erickson, in anticipation, no doubt, of a potential line of attack from the defence. Mr. Smith testified:

[C]learly, one of the issues we discussed with members from the Centre of Forensic Sciences was the potential for in-house contamination, if I can call it that, which — I mean, I haven't read that report. I've just heard about here, and through the press. But that seems to suggest that the most likely source for the contamination was in-house, and we had, I thought, very carefully with Mr. Erickson and Ms. Nyznyk gone through their practices to ensure that there would not be in-house contamination, and obviously, that report would bear very much on that issue.

Ms. MacLean testified:

In fact, Mr. Erickson and I discussed the issue of contamination at the laboratory, and he gave me a study which demonstrated that it was very unusual to have contamination within a lab.

I accept the prosecutors' evidence in this regard.

Findings

The evidence is overwhelming that Mr. Erickson and Ms. Nyznyk deliberately chose to cover up the in-house contamination. This was not done out of personal malice towards Guy Paul Morin or with any desire to convict

an innocent person. They did believe, rightly or wrongly, that the contamination was unrelated to Ms. Nyznyk's findings. Of course, this was no excuse for their actions.

(viii) Ms. Nyznyk's Testimony at the First Trial

Ms. Nyznyk commenced her testimony on January 28, 1986, which she acknowledged was within two weeks of learning about the contamination. She agreed that she had not forgotten about it. She testified as follows at the Inquiry:

Q. I mean, you went and gave evidence in a first degree murder trial before a jury within a two-week time frame of finding out about this contamination, when everyone in your section's talking about it, but you chose not to talk about it in court; right?

A. Again, in court, the — again, the results, all the slides, the results were on slides already prior to no fibres were removed from those tapes for any of the trials.

Q. Which amounts to a statement by you that you chose not to talk about it. I mean, that's what you're saying. You're saying: I've decided in my mind that my findings had not been affected by contamination, so I chose not to talk about it in my evidence. That's what you're saying.

A. Essentially, yes.

(ix) Non-Disclosure at the Second Trial

The Pre-Trial Motions

During the pre-trial motions, Ms. Nyznyk was cross-examined as follows:

Q. Did you, Ms. Nyznyk, at some point, become aware in this case of something — I'm not sure if the technical term is correct; for want of a better word, something called contamination, a problem in the field of fibres, of fibres being transmitted sort of in the air,

and contamination of fibres. Was that a present issue in this case throughout?

A. If I recall correctly, I think that was brought up at the first trial.

Q. Well, what is the answer to my question? Was it a matter of concern to you, however it was brought up, or whatever brought it to mind? ... [W]as it something that was of concern to you in this particular fibre analysis, given your expertise as an analyst?

A. Well, contamination is something we always have to be very careful with in every case we do. This case, no more so than any other case.

The Second Trial

Before the jury, Ms. Nyznyk was cross-examined extensively by Mr. Pinkofsky about various kinds of contamination, including contamination at the CFS or at the instance of the police investigators or through the environment. Ms. Nyznyk told me that she understood that Mr. Pinkofsky was trying to convey the impression that if the CFS had to take great precautions against contamination, it could easily have occurred when the police were at the body site or when they taped the Honda. It was suggested to Ms. Nyznyk that it would have been natural for her to mention the contamination which had occurred at the CFS. Ms. Nyznyk responded that the contamination did not affect her results and it did not occur to her to mention it. She also stated that she often gets cut off in cross-examination if she starts to volunteer opinions.

Ms. Nyznyk later expanded on this last explanation. She testified that in Court she answers questions with either a yes or a no, or specifically in terms of what was asked. This is what she was taught to do. She would never mention that contamination was found in a case unless she was specifically asked about it. She testified that she did not choose not to talk about the contamination at the trials; it was just something that never came up.²⁸

Ms. Nyznyk was referred to several portions of her testimony at the

²⁸ This answer can be compared to the answers, reproduced above, which Ms. Nyznyk gave about her testimony at the first trial.

second trial where the issue of contamination was arguably raised. Two examples follow. Ms. Nyznyk testified in cross-examination:

Q. Would you agree that if in fact in any case there has been contamination of clothing items that you are being asked to examine, ... then in those circumstances where that is the case, the value of any comparisons you could make is really kind of thrown out the window? The contamination makes that kind of situation sort of valueless and unreliable. Correct?

A. Again it would depend on the type of contamination that would be involved in the case itself. If I was aware of the contamination then I could take precautions against that type and any fibre types or something along that line, I would eliminate from my examination. It again depends on the case, if I am aware of the contamination or not.

She was then re-examined by the Crown:

Q. Finally, Mr. Pinkofsky raised the issue of contamination or risks of contamination. What I would like to ask you is, given the number of hair and fibre matches in this case, is it likely they're all due to contamination?

A. It's possible but I would consider it to be highly unlikely.

At trial, Ms. Nyznyk was also asked why she taped the items in the *Morin* case before letting any other scientists examine them. She responded that it was to preserve the fibres that were present on the items and *reduce the risk of contamination at the CFS*.

Exhibits Filed at the Second Trial

Several tapings (on acetate sheets) were made exhibits at the second trial. They were available in the jury room for the jurors to view during their deliberations. Those tapings had become contaminated by the time of the trial. Some contaminant fibres may have been visible to the naked eye. Ms. Nyznyk testified that it never occurred to her to mention the fact that the exhibits were contaminated, and thus presumably looked different than they

did at the time of the original examination.

Findings

Ms. Nyznyk did not mention the in-house contamination at the first trial. She did not mention the in-house contamination at the second trial, despite the tenor of the questions directed to her. She denied that her testimony at the second trial was untrue. *Whether or not, strictly speaking, it was untrue, it was less than forthcoming on the issue of contamination. Without knowing about the in-house contamination, Mr. Pinkofsky asked questions which could reasonably be expected to elicit such contamination, if it existed.* This was not unlike the situation when Ms. Nyznyk initially testified before me.

Ms. Nyznyk may not have directed her mind to the fact that the jurors at the second trial were being provided with exhibits which were contaminated. However, the filing of contaminated tapings as exhibits, without acknowledgement of the contamination, was potentially misleading.

(x) Non-Disclosure by Other CFS Employees

Prior to this Inquiry, no one at the CFS disclosed the contamination to anyone — at least, anyone we know of — outside the Centre. The evidence reveals that the contamination was known to a number of CFS employees. Mr. Crocker stated that every analyst and technician who knew was obliged to disclose the information to the prosecution and the defence. I am not prepared to attribute responsibility to specific persons other than Mr. Erickson and Ms. Nyznyk. Some of these employees were entitled to assume that the section head of biology and the analyst directly involved would act responsibly.

Ms. Stefak is to be commended for taking affirmative steps to bring this matter to the attention of the Centre's Director and to this Commission. Having said that, I also appreciate that the institutional structures and hierarchy in place made it exceedingly difficult for employees to make their concerns known.

Ms. Scheffel's evidence is of interest in this regard. She testified that after Ms. Nyznyk discovered the contamination in 1985/86 it became the

topic of social conversation in the laboratory. *People expressed the hope that Mr. Morin would not be convicted on the hair and fibre evidence. They were comforted, however, by the possibility that there might be lots of other evidence against him.*

Steps must be taken to better ensure that such concerns can be expressed, will be heard and will be acted upon.

(xi) The Causes and Timing of the Contamination

Conflicting views have been expressed before me as to whether the in-house contamination affected Ms. Nyznyk's fibre comparisons. Some of the evidence bearing upon that issue has already been highlighted. I now examine the potential causes for contamination advanced in the evidence.

Contamination Before the CFS Took Possession

Mr. Erickson testified that contamination can occur during the taping process — that is, the person taping an object could inadvertently drop or shed contaminant fibres onto the object or otherwise contaminate the object before it is taped and sealed in the acetate. There is no evidence that Inspector Shephard and Detective Fitzpatrick, who taped the interior of the Honda, contaminated those tapings. All the tapings of Christine Jessop's clothing and personal effects, all the Honda vacuumings and some further tapings of the interior of the car were performed at the CFS. These tapings and vacuumings were contaminated. It follows that much of the contamination cannot be attributed to the tapings performed by the police.

Contamination After the CFS Relinquished Possession

Mr. Erickson initially suggested that the contamination might have occurred after the tapings and vacuumings left the CFS and before they were returned to the CFS for further review. He testified that the contamination had been caused by whoever had handled the tapings. He speculated that the tapings might have been handled during the Court proceedings, or by the police in order to take inventory for Court. When Mr. Erickson offered this theory, he was still asserting that he had 'discovered' the contamination in 1990/1991 after the tapings had been returned to him from the police. Ms. Stefak's 1985/1986 discovery of the contamination had not yet become

public knowledge. When Mr. Erickson was later reminded of Ms. Stefak's earlier discovery, he accepted that the contamination would appear to have taken place at the CFS.

Storage

Both Mr. Erickson and Ms. Nyznyk pointed to the time when the tapings were stored after the initial examination of them was completed as a time when the contamination might have occurred.

As indicated earlier, an examiner removes a fibre from a taping by either lifting the taping off the acetate sheet or by making a V-shaped cut through the taping or acetate sheet thereby creating a wedge in the area where the desired fibre is located. After the fibre is removed, the examiner will normally press the taping or wedge back down onto the acetate sheet. Both Mr. Erickson and Ms. Nyznyk testified, however, that the taping or wedge will not always re-adhere. Mr. Erickson stated that the solvent used to remove the fibre can prevent the adhesive on the underside of the taping from bonding with the acetate sheet. Ms. Nyznyk said that the solvent can become sticky when it dries and cause a warping or bunching of the taping on the acetate. In either case, contamination of the underside of the taping becomes possible as loose fibres may attach to the exposed areas.

Mr. Erickson testified that all the tapings would have been stored together in a box. This could have allowed for the different sets of tapings to be contaminated by similar fibres. Mr. Erickson was later confronted with the CFS records of how the tapings and vacuumings were packaged when they were returned to the laboratory in 1990/1991 for re-examination. The records appeared to reflect that the tapings associated with Christine Jessop were not stored in the same box as the tapings associated with Mr. Morin, and that the Honda vacuumings were stored separately from the Honda tapings. Mr. Erickson then acknowledged that he could not explain how the same fibres could have contaminated all the different items.

Although Ms. Nyznyk suggested that the contamination might have occurred when the tapings were put away in boxes, she was certain that the different sets of tapings were not stored together. The tapings associated with Christine Jessop were stored together in a file folder. The tapings done by the police were stored in the envelope in which they had been submitted to the CFS.

Fur Samples

Some of the contaminants found by Ms. Stefak were red animal hair fibres. These are less common fibres. The question arose, therefore, as to how such fibres could have accidentally contaminated so many different tapings and vacuumings. Mr. Erickson, Ms. Nyznyk and Ms. Stefak all suggested that the red animal hair contamination might have come from fur samples which were submitted to the CFS for comparison with the fibres found in the initial examination by Ms. Nyznyk.²⁹ These samples were not submitted until after Ms. Nyznyk had completed her examination, although they arrived before Ms. Stefak had completed her first examination.

The fur samples came in envelopes. Ms. Stefak believed that 18 of the envelopes contained some shade of red burgundy purple animal hairs. Many of these fibres were loose in the envelopes. Ms. Stefak and Ms. Nyznyk suggested that some of them may have inadvertently fallen on a desk when the envelopes were examined, and then later come into contact with the tapings. Ms. Nyznyk speculated that transfer to the tapings may have occurred when Ms. Scheffel mounted control samples from the fur samples; this was after Ms. Nyznyk had examined the tapings, and therefore after the addition of solvent might have allowed for contamination. Mr. Erickson suggested that the loose fur samples may have been transferred onto the tapings and possibly into the storage boxes when the tapings were packaged.

The fur samples were submitted to the CFS on December 20, 1985, and January 3, 1986. Ms. Scheffel testified that she first examined the samples on January 8, 1986. Ms. Stefak could not say when she discovered the contamination. However, as indicated above, she thought it was before the first trial (which commenced on January 7, 1986). She suggested that Ms. Nyznyk might have opened the envelopes and quickly looked at the fur samples before January 8th. Ms. Nyznyk testified that the samples were left in their envelopes until Ms. Scheffel mounted and identified them.

Ms. Scheffel testified that any suggestion that the contamination could have resulted from her examination of the fur samples was, in her view,

²⁹ Ms. Nyznyk was trying to find a potential source for the extraneous 'incriminatory' fibres which she found. The samples came from various clothing manufacturers in Ontario. After testing, it was determined that none of the samples were similar to the 'incriminatory' fibres.

preposterous. She said she examined the samples in her own room, she had last examined the tapings from the Morin case in June 1985, and no one else was working in her room. Ms. Nyznyk testified that Ms. Scheffel normally worked in the room where Ms. Stefak examined tapings.

Irrespective of whether the red animal hair contaminants came from the fur samples, the samples could not have caused all the contamination observed by Ms. Stefak in 1990/1991. Ms. Stefak found red wool contaminants on numerous tapings. None of the fur samples were wool fibres, and she accepted that none of the fur samples could have caused the red wool contamination.

Contamination During the Initial Examination

Mr. Erickson and Ms. Nyznyk offered several reasons why the contamination could not have occurred during the initial examination. Other evidence suggested that it could have occurred then.

Various witnesses, including Mr. Erickson and Ms. Nyznyk, stated that a trained examiner would have seen the contamination, if present during the initial examination. Ms. Nyznyk said that she did not see any contaminants during her examination. There were no fibres attached to the outside of the tapings. She agreed that others have to rely on her integrity and expertise to accept that she would have noticed any contaminants.

Ms. Nyznyk noted that Ms. Stefak reported that the contamination was visible to the naked eye. Ms. Nyznyk was shown the slides made of the fibres Ms. Stefak observed in her 1990/1991 re-examination.³⁰ Ms. Nyznyk agreed that most of the fibres were microscopic and not visible to the naked eye. She pointed out, however, that at least two of the fibres were long red ones that were indeed visible. Ms. Nyznyk's opinion was challenged on the basis that Ms. Stefak (in 1990/1991) found many different types and colours of contaminants. Ms. Nyznyk agreed that this variety might indicate there was more than one contaminating event, and if that was the case, the more visible contaminants might not have been present at the time of mounting. Ms. Nyznyk still did not accept that even microscopic contaminants could have

³⁰ Ms. Stefak was not certain if all the fibres on these slides were contaminants. The slides she made in 1985/1986 could no longer be found.

been present on the tapings she initially examined.

Mr. Erickson and Ms. Nyznyk were cross-examined on the possibility that contaminant fibres might have fallen onto the exposed areas of the tapings during the mounting process, and then been unwittingly removed by the examiner when she later returned to the same area of the taping. Each testified that, although contamination is not possible during the mounting process, it is possible afterwards when areas of the tapings cut during mounting (the 'wedges') remain exposed. Mr. Erickson indicated that the tapings would only be exposed for a very short period of time. He also testified that an examiner would not return to the exposed area to retrieve more fibres. Ms. Nyznyk testified that after making a cut in a taping, she may return to the taping and make other cuts very close to the first one.

Ms. Nyznyk testified that all the fibres she mounted during her initial examination were removed from the middle of the tapings. None of them were removed from the ends where the risk of contamination is greater. Ms. Nyznyk was also confident, 12 years after the event, that all the 'incriminatory' fibres she removed were embedded in the tapings. Mr. Crocker explained that fibres collected during the taping process tend to become embedded in the tapings as the tape is pressed against the object being taped, pushing the collected fibres underneath. Contaminants which subsequently fall onto the tapings, on the other hand, tend to sit on the surface of the underside. Ms. Nyznyk did not know whether any of the contaminants observed by Ms. Stefak in 1985/1986 were embedded in the tapings. Ms. Stefak was not asked about this issue.

Mr. Erickson and Ms. Nyznyk both testified that another reason why the contamination could not have occurred during the initial examination was that the examination of the tapings associated with Christine Jessop was completed and the tapings stored before the examination of the tapings associated with Mr. Morin began. As such, it was unlikely that the different tapings would be contaminated with similar fibres, as they apparently were. Ms. Nyznyk was confident that the two sets of tapings were never open at the same time. She agreed that it was reasonable that all the tapings must have been together when the contamination occurred. She further agreed that it was unlikely that two sets of tapings would both be contaminated with as uncommon a fibre as red animal hair if they were examined months apart.

It was suggested to Mr. Erickson that Ms. Nyznyk's notes of April 29,

1985, indicate that she mounted fibres from both Christine Jessop's clothing and the Honda on that day, thereby revealing a time when both sets of tapings would have been open at the same time. As noted above, Ms. Nyznyk rejected this suggestion in the context of a different issue. Mr. Erickson testified similarly. He suggested that Ms. Nyznyk probably worked on only one set of tapings on April 29th, but also examined slides previously made from the other set. He reasoned that it would have been impossible to have mounted on one day the hundreds of fibres listed in the April 29th notes. Mr. Erickson agreed that if Ms. Nyznyk had been assisted by a technician, it would be "a little different."

Ms. Stefak was questioned about the fact that she found so many tapings contaminated with so many contaminants. She thought the most logical explanation for this is that the contamination occurred when the acetate sheets holding the tapings were open. She further testified that the most logical reason for the acetates to be open is because they are being examined. She did not think that people opened acetate sheets for no reason.³¹

As indicated earlier, in her 1990/1991 re-examination, Ms. Stefak only found contamination in the vacuumings which appeared to have been previously examined. She agreed that this suggested that contamination of the vacuumings occurred at some time during their examination at the CFS. The contaminants in the vacuumings were red animal hairs, the same type of contaminants which affected the tapings. Ms. Nyznyk testified that the vacuumings were never open in the presence of the tapings.

Safeguards Against Contamination

Mr. Erickson testified that the potential for accidental transfer of fibres between items is very great, and that fibre examinations necessitate the thorough application of preventative measures.

Ms. Nyznyk indicated that one item was taped at a time. The taping was performed on a table covered with brown craft paper. A new sheet of paper was used for each item. Tapings of the items associated with Christine

³¹ Despite this evidence, Ms. Stefak was reluctant to accept that the contamination could have occurred during the initial examination. She felt that any person trained in trace evidence would have noticed the contamination she observed in 1985/1986.

Jessop and those associated with Mr. Morin were done in different rooms. The examiners wore lab coats and disposable gloves. When the tapings were later examined, the examiners again wore lab coats and gloves. An examiner would change her gloves when moving from one taping area to the next. But an examiner would only sometimes change her coat.

Ms. Nyznyk was the only witness to testify to the safeguards adopted during the Morin examinations themselves. Other witnesses gave evidence as to the safeguards which were normally employed during the same time frame.

Mr. Lucas said that in 1985 examiners always wore lab coats. Ms. Scheffel testified that although the examiners were supposed to wear lab coats (and she always did), the rule was not heavily enforced; she saw others working without coats. Ms. Sedgewick testified that a lab coat closed in the front, but she did not know if it covered the entire garment underneath, *i.e.* if the top chest area was left uncovered or the sleeves stuck out.

Mr. Lucas testified that examiners always wore disposable gloves. Ms. Sedgewick testified that although she regularly used rubber gloves, she did not always do so. She did not recall if she wore, or was required to wear, them when mounting fibres. Ms. Scheffel testified that examiners were only required to wear gloves while working in serology, and that she personally only started wearing them during fibre examinations after a problem with contamination was identified.

Ms. Nyznyk testified that although she always used brown craft paper in 1985/1986, it was not mandatory to do so. Ms. Sedgewick testified that she mainly worked on bare tables which were washed down before each use. Ms. Scheffel testified that a rule mandating the use of craft paper was promulgated before she left the CFS in November, 1989, and after the problem with contamination.

Messrs. Erickson and Lucas testified that the victim's and accused's items were taped in different rooms. Ms. Scheffel testified that this rule came about *after* the problem with contamination. The rule was contained in a 1987 CFS circular. Mr. Lucas testified that CFS circulars generally codified existing practices, but sometimes established new procedures.

The Red Sweater

I have previously referred to the anonymous letter, alleging that Lynn Sedgewick handled items of trace evidence associated with the *Morin* case while wearing a red sweater, but no protective lab coat. The potential of a contaminating red sweater also arose in another way. A CBC news broadcast of September 16, 1985, showed a person at the CFS demonstrating how tapings are performed. Only the person's arms are visible. The unidentified CFS employee was wearing what appears to be a red sweater, exposed through his or her lab coat.

Ms. Sedgewick worked as a technician at the CFS from 1984 to June 1985. She did own a bright red wool sweater in 1984/1985, and might have worn it while working at the CFS. Ms. Scheffel and Ms. Nyznyk both testified that they saw her wearing a red sweater at the lab. Ms. Scheffel said the sweater was bright red and fuzzy. Ms. Nyznyk thought that someone — she could not recall who — told Ms. Sedgewick that the sweater was an inappropriate item to wear in the laboratory.

Ms. Scheffel could not recall if Ms. Sedgewick always wore a lab coat over her sweater. Ms. Sedgewick believed that she did, but could not be certain. Ms. Nyznyk indicated that Ms. Sedgewick was not working on the *Morin* case when she saw her wearing the sweater.

The evidence established that Ms. Sedgewick had contact with at least some of the items examined in the *Morin* case, but the exact extent of her contact was unclear. Ms. Sedgewick could not recall if she took any tapings from the Honda. Ms. Nyznyk was almost positive that only she and Ms. Scheffel did so. Ms. Scheffel agreed that the CFS notes of April 18, 1985, reflect that she taped the seat cover found in the Honda. Ms. Sedgewick testified that she was present for the vacuuming of the Honda on April 24 and 25, 1985, but could not recall whether she assisted or just observed.

The CFS notes indicate that Ms. Sedgewick worked on items related to the *Morin* case on April 29, May 8 and June 17, 1985. Ms. Sedgewick accepted that she may have been exposed on those dates to all of the 'items' associated with Christine Jessop as well as the tapings and vacuumings from the Honda. However, she could not recall what work she performed, and the notes only indicate that she helped identify previously mounted fibres. Ms. Sedgewick did not know if she ever mounted fibres relevant to the *Morin*

case. Ms. Nyznyk testified that she did all the fibre work herself, and that Ms. Sedgewick never removed or identified any fibres from tapings.

Mr. Erickson did not accept that someone's red sweater could have been a factor contributing to the contamination. However, as noted above, he did telephone Lynn Sedgewick and Brenda Scheffel in 1990 or 1991 to determine whether either ever owned a red angora sweater. Mr. Erickson testified:

Q. Was there not some discussion back then about maybe somebody was wearing a sweater that could explain these fibres. I mean, that was one of the topics of discussion ...

A. That was one of the topics of discussion, but you have to appreciate that people wear lab coats, so I couldn't accept that as a possible explanation.

.....

Q. Jumping ahead for a moment, we heard that you called several people, Ms. Sedgewick, and Ms. Scheffel, and asked them about sweaters they may have been wearing?

A. Yes.

Q. But you didn't accept that as a possible explanation. Why ask them about it?

A. Because they were the ones that were working on it. I did that in 1990, prior to doing the re-examination of this case.

Q. What had generated that?

A. Well, as you said, the discussion about possible contamination through a sweater. I wasn't prepared to accept it, but I had to satisfy my own mind, and I felt incumbent upon me to determine that that could not be a source of the contamination.

During cross-examination by counsel for the Morins, he stated:

Q. I suggest to you, sir, there's only one conceivable

reason you call these two people and ask them if they ever owned red angora sweaters, and that's to see if Stefak findings could have been caused by them, when they did their original tapings.

A. No.

Q. When they did their original mountings and when they did their original examinations.

A. And I suggest you're wrong. I was concerned that the contamination that was found by Ms. Stefak, later could have been a result of them. But the initial examination I have no question was done in a proper fashion.

There could not have been any legitimate concern that Ms. Sedgewick had contaminated the tapings *after* Ms. Nyznyk's earlier findings. Ms. Sedgewick left the CFS in June 1985.

Traffic in the CFS

Ms. Stefak testified that the contamination could have been caused by someone coming into the room when the exhibits in the case were being examined. Ms. Nyznyk explained that it was possible someone standing in one room could accidentally pick up a fibre from one garment and later transfer it to a suspect's garment when the person moved to a second room. As indicated above, Ms. Nyznyk testified that an examiner would not always change her coat when moving between taping areas.

Mr. Lucas did not think that there would have been a lot of traffic between examination areas in the 1980s, but acknowledged that any traffic can potentially lead to contamination. He testified that there was no formal policy regarding movement between rooms, and visitors were not required to wear lab coats. He also agreed that examiners would not necessarily change lab coats in between examining different items.

Contamination Between Cases

Both Ms. Scheffel and Ms. Nyznyk agreed that contamination between cases was possible.

Ms. Nyznyk testified that an examiner would normally work on 10 to 20 different cases at the same time, sometimes in the same environment. This gave rise to the possibility of cross-contamination between cases. Ms. Scheffel testified that she would wear the same lab coat for several days while working on several different cases. She acknowledged that fibres from one case could adhere to her coat and later fall onto items from another case. Ms. Sedgewick similarly testified that she might have worn the same lab coat for several days while working on several different cases. Neither she nor Ms. Scheffel recalled any rules about changing lab coats between cases.

Findings

To state the obvious, it is entirely unsatisfactory to attempt, 12 years after the fact, to determine the causes of in-house contamination. The CFS failed in its obligation to properly and contemporaneously investigate the causes of the contamination. The decision not to reveal the contamination outside the CFS compounded the problem. The inadequacy of records as to who examined what trace evidence and when also compounded the problem. For example, the CFS witnesses could not even tell me with precision who assisted in the various Morin examinations and in what way they assisted. Forensic analysts and technicians must understand that their contact with trace evidence must be fully documented. My later recommendations address this issue.

It is now impossible to determine which of the many potential causes of contamination actually contributed to the contamination in this case. Dr. Young, relying on Mr. Hopen's findings that some contaminants and some case fibres were indistinguishable, has conceded on behalf of the CFS that the original findings were tainted by contamination. Ms. Nyznyk and Mr. Erickson disagree. I am unable to exclude the possibility that the original findings were tainted based upon Ms. Nyznyk's evidence that she would have noticed the contamination. Not only could the contamination have been less pronounced on initial examination than it ultimately was, but the accuracy of Ms. Nyznyk's evidence (and her skills as a scientist) have been sorely tested at this Inquiry.

Even if Ms. Nyznyk and Mr. Erickson were correct that the contamination did not affect the initial findings, the contamination was serious. If Mr. Erickson truly believed that the police contributed to the contamination, why would he not discuss this issue with them to prevent

contamination by them in other cases? Why would no steps be taken when the contamination was discovered to ascertain whether the contamination affected other cases?

Another point concerns me. The attitude of Ms. Nyznyk and Mr. Erickson appeared to be that contamination after Ms. Nyznyk's findings was irrelevant to the *Morin* case. But what if Guy Paul Morin was proven innocent? Would it not follow that the trace evidence might have to be re-examined at some point in the future in connection with another suspect or accused? Indeed, that is the present situation — the Metropolitan Toronto Police now have to contend with contaminated fibre evidence in their ongoing investigation. When Guy Paul Morin was acquitted *the first time*, should not Ms. Nyznyk and Mr. Erickson have drawn the contamination to the attention of the authorities, if they were truly objective and did not presuppose that Mr. Morin was guilty anyway? *In other words, the attitude that the contamination was irrelevant if it did not affect Ms. Nyznyk's original findings reveals an unconscious bias: the fibres findings were, in their minds, only relevant to the case against Guy Paul Morin.*

P. Failure to Communicate Exculpatory Findings

(i) Introduction

Mr. Erickson was questioned at some length about two types of fibres:

1. coarse yellow fibres from the seat covers and carpeting in the Morin Honda, which were not found on Christine Jessop's clothing; and
2. blue acrylic fibres from the sweatshirt worn by Christine Jessop, not found on the tapings from inside the Morin Honda.

When Ms. Stefak conducted her re-examination in 1990/1991, she made two findings over and above her findings of contamination. First, she found no blue fibres, similar to those that made up Christine Jessop's sweatshirt, on the tapings from the Honda. Second, she confirmed that Ms. Nyznyk had removed all the yellow fibres from the tapings of Christine

Jessop's clothing; Ms. Nyznyk had determined that none of those yellow fibres were similar to those that made up the Honda seat covers and carpeting.³² Both of these findings are reflected in her February 5, 1991 "Summary of Textile Examinations." As we already know, this Summary was never disclosed to anyone outside the CFS. Mr. Erickson also failed to mention Ms. Stefak's findings in any conversations or correspondence with the prosecutors, the police or defence counsel.

Mr. Cook testified before the Inquiry that Ms. Stefak's findings concerning the blue and yellow fibres should have been disclosed. Mr. Erickson generally testified that the failure to disclose was inadvertent, but he once suggested that Ms. Stefak's findings had no probative value for either the defence or the Crown. *This suggestion does not survive scrutiny.*

(ii) Yellow Fibres

Mr. Erickson testified that prior to the second trial he had been concerned about the lack of coarse yellow fibres, similar to those found in the Honda, on Christine Jessop's clothing. Put simply, the concern was that one might expect Christine to have collected some of these yellow fibres from the Honda, had she been in it. Mr. Erickson advised the prosecutors of his concern, and examined the Honda seat covers because of it. He testified that he was ultimately satisfied that a number of variables could account for the lack of fibres: the seat covers were worn and did not shed much, the covers were found either under the seat in the car or in the Morins' house, and thus he could not be certain they were on the seats at the time of Christine Jessop's abduction. Further, Christine Jessop's clothing was not examined until six months after she might have been in the Honda, thereby allowing time for the fibres to fall off. Despite these factors, Mr. Erickson admitted at this Inquiry that the lack of yellow fibres on Christine Jessop's clothing remained a concern.

Mr. Erickson was asked about the lack of similar yellow fibres at the second trial. He explained their absence by the low shedability of the seat cover. *He did not mention that he was still concerned about the issue.* He also

³² Ms. Stefak's finding demonstrated that Ms. Nyznyk had not missed any yellow fibres, and consequently confirmed that there were no similar yellow fibres on Christine Jessop's clothing.

neglected to tell the jury that a study which he had given to the prosecutors revealed that the type of seat cover upholstery most likely to shed was the upholstery found in the Morin car, or that corduroy, which was the material of which Christine's trousers were made, was the type of fabric most likely to attract extraneous fibres. *He could not recall why he did not.*

Mr. Erickson advised Ms. MacLean on October 2, 1991, that his concern about the lack of yellow fibres had been addressed by the low shedability of the seat covers. Ms. MacLean testified that Erickson gave no indication that he still had concerns.

Mr. Erickson prepared a report of his examination of the seat covers on October 4, 1991. In it, he stated that Ms. Nyznyk had not found any seat cover or carpet fibres on Christine Jessop's clothing, and that the covers were worn and of low shedability. He neglected to mention Ms. Stefak's confirmatory finding or his continuing concern. Mr. Cook testified that Mr. Erickson should have expressed his concern in the report.

One of Mr. Morin's counsel requested a report about the yellow fibres in a letter dated March 27, 1991. Ms. Nyznyk prepared the requested report (dated November 1, 1991), even though she was no longer working at the CFS. It was suggested to Mr. Erickson that he had Ms. Nyznyk prepare the report so as not to have to disclose Ms. Stefak's confirmatory finding, which Ms. Nyznyk did not know of at the time. Mr. Erickson agreed that if he had prepared the report, it would have been hard for him to omit any reference to Ms. Stefak's re-examination. He explained, however, that Ms. Nyznyk prepared the report because she had done the examinations and she had determined that there were no similar yellow fibres on the tapings of Christine Jessop's clothing. He had never seen the yellow fibres removed from the tapings. He added that Ms. Stefak's finding had not been surprising and had merely confirmed that Ms. Nyznyk had removed all yellow fibres.

(iii) Blue Fibres

One of the defence experts, John A. Reffner, expressed the opinion that the absence of any blue acrylic fibres, similar to those which made up Christine Jessop's sweatshirt, on the tapings from the Honda supported the proposition that Christine had never been in the car. In his evidence before the Inquiry, Mr. Erickson never expressly indicated whether he agreed with that opinion. His actions prior to the second trial, however, arguably indicated

that he was concerned about the general issue of the transfer of fibres from Christine Jessop's clothing to the interior of the Honda. He requested that Ms. Stefak search for the sweatshirt fibres in her 1990/1991 re-examination. He examined the fibres from Christine's corduroy pants to see whether they were distinctive enough to locate on the car tapings.³³ He also discussed the general issue with the prosecutors. In particular, Mr. Erickson advised Ms. MacLean on October 2, 1991, that the fibres from Christine were too common to look for. He failed to mention that he directed Ms. Stefak to look for fibres which could come from Christine's sweatshirt. Ms. MacLean testified that she thought Mr. Erickson (and Ms. Nyznyk) once told her that all of Christine Jessop's clothing was too undistinctive to look for. *Mr. Erickson could not explain why he neglected to mention Ms. Stefak's work to the prosecutors.*

At the second trial, Ms. Nyznyk said that the absence of any fibres from Christine Jessop's clothing in the Honda was of no significance because the fibres were too common. When Mr. Reffner offered his opinion to the contrary, Ms. MacLean cross-examined him on the premise that no one had ever looked for fibres from Christine Jessop's sweatshirt in the car because the exercise would have been pointless.³⁴ Mr. Reffner acknowledged that if the fibres were too common to look for, one could not draw an inference from their absence that Christine Jessop had not been in the Honda. The trial judge reminded the jury of this admission in his charge.

Findings Relating to Mr. Erickson

Because Ms. Stefak's search for fibres from Christine's sweatshirt (done at Mr. Erickson's request) was never disclosed, Mr. Reffner was cross-examined on a false factual premise, the prosecution made its submissions based on a false premise, and the trial judge charged the jury on a false premise. *Mr. Erickson bears the responsibility for this state of affairs. His failure to disclose demonstrates a misapprehension of his role as an independent, neutral scientist.* A scientist is not entitled to discount a

³³ If fibres are not distinguishable from extremely common fibres, such as cotton, forensic scientists do not search for them, since any findings could readily be attributed to coincidence.

³⁴ She also indicated in front of the jury that she had information to support that premise.

potential defence position (or indeed a Crown position) and then fail to disclose evidence which might bear upon that position. Indeed, here we have something worse — *Mr. Erickson did not make full disclosure, despite his lingering concerns about the absence of certain fibres one might expect to find*. Mr. Erickson was too easily prepared to discount evidence which could favour the defence. I again note that the prosecutors bear absolutely no responsibility for this situation. They were entitled to rely upon the scientists. I also find that Ms. Stefak bears no responsibility for the failure to disclose her report. I accept her evidence in this regard:

A. I have no way of knowing what's reported. I believe I stated earlier that technicians do their work and hand it back to the scientist, and the scientist is the person who reports to the courts, who writes the reports and speaks with the court personnel such as lawyers and police officers. The technician basically is finished with their case when they turn the work back to the scientist.

(iv) Ms. Nyznyk's Testimony

At the second trial, Ms. Nyznyk testified about the various fibre findings which she made in Mr. Morin's case. She was then asked about all the other fibres she examined. Ms. Nyznyk responded that there were "no significant results" with any of those fibres. Counsel for Mr. Morin suggested to Ms. Nyznyk at this Inquiry that her answer was biased in favour of the prosecution: it implied that the other fibres produced no significant results for the prosecution. It ignored the fact that the absence of other findings potentially assisted the defence. Ms. Nyznyk rejected this suggestion. She stated that "no significant results" meant that she looked at the other fibres and made no comparisons. She further stated that she would not have considered testifying at trial that the other fibre comparisons produced no results which assisted the prosecution, and that is something which may be of significance to the defence.

Ms. Nyznyk was asked about the same issue in reference to her reports. She testified that in her reports — and CFS reports in general — the phrase "no significant findings" is used to describe any findings where no positive comparisons were found. Thus, that phrase was used to describe the

hundreds of fibre comparisons which did not result in findings of similarity.³⁵ At the same time, there was no reference in any of Ms. Nyznyk's reports to hairs and fibres which could not have come from Mr. Morin or Christine Jessop. Ms. Nyznyk could not explain why not.

Mr. Lucas testified that the CFS cannot make reports so long that they are incomprehensible, and pointed out that an examiner's notes are available for review. He did acknowledge that CFS reports might need to include more information about the limitations of the findings listed. Mr. Cook stated that reports from his laboratory are expected to look at the evidence from the point of view of the prosecution *and* the defence. He testified that the form of Ms. Nyznyk's (and some of Mr. Erickson's) reports would not currently be acceptable at his laboratory, although they would have been acceptable in the mid-1980s. My later recommendations address this issue.

Ms. Nyznyk was asked at the second trial about the fact that she had been unable to identify any dog guard hairs on Christine Jessop's clothing, whereas she found large quantities of dog hairs inside the Morin Honda. Ms. Nyznyk testified at the trial that she would expect the guard hairs to have been washed away from Ms. Jessop's clothing. It was suggested that this was an example of Ms. Nyznyk trying to rationalize away evidence favourable to the defence. Ms. Nyznyk acknowledged before the Inquiry that the evidence could be helpful to Mr. Morin, and that she would have expected to find some dog hairs on Christine's clothing. She denied, however, that she was biased against the defence. She stated that in giving her answer at trial she was simply relating a fact; she would not have appreciated that it favoured the prosecution.

Q. Failure to Examine the Classmates' Hairs

Mr. Erickson examined hairs from Christine Jessop's classmates between the first and second trial, determining that two had microscopically similar hairs to the necklace hair.

Detective Fitzpatrick and Inspector Shephard testified that they

³⁵ Mr. Erickson acknowledged that a defence counsel who is unfamiliar with forensic science might not know from the report that the positive findings made by the CFS came from an examination of thousands of fibres.

brought hair samples from Christine Jessop's classmates to Ms. Nyznyk in May 1985, well before the first trial. Inspector Shephard stated that he thought it would be a good idea to check whether one of them could have been the source of the necklace hair. Both testified that Ms. Nyznyk said that she was too busy to examine the hairs. Inspector Shephard also testified that she asked them to keep the samples, and said that she would test them if she got time, but that it was more important to finish working on the fibre samples taken from the Honda and Christine Jessop's clothing.

Ms. Nyznyk initially explained her failure to test the classmates' hairs by noting that the police never formally submitted them to the CFS. She testified that if they had been submitted she would have examined them. She acknowledged discussing the classmates' samples with the officers, but believed she simply would have told them that she had a lot of work to do and that it would take a while for her to examine the hair samples.

Inspector Shephard acknowledged that he never formally submitted the classmates' hairs to the CFS by completing a submission form. He further acknowledged that doing so might have emphasized the importance of the examination.

Ms. Nyznyk agreed that the police discussed the hair samples with her with a view to having her examine them. She accepted that the police would have relied on her opinion as to the value of such an examination. She admitted that she was working under time constraints. She conceded that she did not recall exactly what she discussed with the police, and that she could not say how the decision was made not to submit the samples for analysis. Ms. Nyznyk ultimately accepted that events may have unfolded as described by Detective Fitzpatrick and Inspector Shephard:

Q. What I'm going to suggest to you, ma'am, is that given the resource limitations, time limitations, that the scenario that is put forward on behalf of my client, that they brought — that's he and Shephard — brought exhibits, that is classmates hair, to the Centre, and were told words to the effect: I don't have time to do them now, and in any event there's other things that are more important to do now, that that is not an unreasonable scenario?

A. That is a possibility, yes.

Ms. Nyznyk later said that she told the police that she would not have time to test the classmates' hairs before any trial or preliminary inquiry, and asked them to hold onto the samples and submit them at a later date if necessary.

Ms. Nyznyk and Mr. Erickson both maintained that finding similarities with the classmates' hairs would not have significantly decreased the value of the necklace hair; Mr. Morin still could not be eliminated as a donor. However, Mr. Erickson could see the importance this finding could have to the defence. He acknowledged that time should have been set aside to do this testing, as he later did. There is no doubt that his later findings respecting the classmates' hairs were important to the defence. They illustrated, in the most visceral way, how little probative value should be given to the similarity between the necklace hair and Guy Paul Morin's hairs.

Inspector Shephard testified that if he had known that two of Christine Jessop's classmates could have been the donor of the necklace hair, he would not have felt that he had enough evidence in April, 1985, to charge Mr. Morin with murder.

R. Reporting Defence Positions to the Prosecution

(i) What Mr. Erickson told Ms. MacLean

On several occasions, Mr. Erickson advised Ms. MacLean about requests or information he had received from Mr. Morin's defence counsel. It was suggested that this reflected a lack of impartiality on his part. Mr. Erickson acknowledged that he would not normally call defence counsel on a case and tell him or her what the prosecutor just asked him. He did not remember calling Crown attorneys in prior cases — he would not do so with the intent of reporting to them on defence counsel's activities.

Mr. Erickson called Ms. MacLean on April 18, 1990, and advised her that Mr. Pinkofsky had been at the CFS looking at the forensic reports. Ms. MacLean's note of the conversation follows:

Norm Erickson called and advised that Jack Pinkofsky was in today to look through the reports, etc. He asked about the red fibre on the shoe. Norm told him that was

not one which was given to him for examination but was in Stephanie's report. I told Norm that all exhibits referred to a trial should have been given to him with the exhibit trays. He said he'd look again.

Mr. Pinkofsky also said he didn't have Stephanie's January 13/86 report re: polyester fibres on recorder + in car. Elizabeth Widner said they might have it back at the office so they'd go back and check. In any event, they saw both reports with Norm.

Mr. Pinkofsky asked why the numerous other hair samples (56?) from firemen, policemen + others, had not been examined for matches. Norm said it is a massive task + he would prefer not to do it. If he does it, Skip Palenik will have to come back again.

Jack Pinkofsky asked if the Crowns or police or anyone had directed the CFS to stop doing any further hair examinations once a match with Morin's hair was found. Norm Erickson said no, + that he was very offended by that suggestion.

Norm Erickson explained that the only test not done on the fibres was the thin layer chromatography test which is one which extracts the dyes, but due to small sample(s), it could not be done in this case.

They also went to see Nan McDonald.

Norm told me he called just to keep me informed of what was going on.

Mr. Erickson explained that he did not call Ms. MacLean to tell her what Mr. Pinkofsky wanted to know. He called her because Mr. Pinkofsky was looking for the fibre found on the shoe, and Mr. Erickson was concerned that he did not have it. He just happened to relate all the rest of his conversation with Mr. Pinkofsky in passing.

Ms. MacLean also had notes of two other similar conversations with Mr. Erickson. On April 30, 1990 she wrote:

Norm Erickson called & said Pinkofsky asked about matters. Norm told him comments in letter apply to the microscopic comparison of any hair. (4 criteria would look for)

- no one-to-one correspondence between hairs, i.e. no one hair corresponds exactly to another, but similar characteristics

- discolouration of hair due to environmental conditions

- all of these will be put in a letter to Pinkofsky & sent to him by Norm - a copy will be faxed to us

On June 8, 1990, Ms. MacLean recorded the fact that Mr. Erickson told her that Ms. Widner, one of Mr. Morin's defence counsel, asked for a reference to an expert botanist. In his evidence before the Inquiry, Mr. Erickson explained that the April 30th conversation with Ms. MacLean occurred because he was forwarding to her, with Mr. Pinkofsky's consent, a letter he wrote for the defence about the classmates' hairs. He could not recall why he needed to advise Ms. MacLean of the request for the name of an expert botanist.

Mr. Erickson denied that he was intentionally supplying the Crown with information about what the defence was doing. However, he did say this:

Q. It doesn't exactly demonstrate a lack of partiality between Crown and defence; does it, sir, MacLean's notes?

A. In terms of two of those [conversations], I would agree with you, but in terms of the third one, no.

Ms. MacLean testified that she had not asked Mr. Erickson to keep her apprised of any inquiries from the defence, but she did not feel that Mr. Erickson had acted improperly:

No, because there was no privilege between Mr. Pinkofsky and Mr. Erickson. And my understanding was that Mr. Erickson was discussing completely all of our issues with Mr. Pinkofsky, and that Mr. Erickson was discussing with us all the issues raised by both sides. I think Mr. Erickson — my impression of Mr. Erickson was that he was trying to be helpful to both Mr. Pinkofsky and the Crown, and just let us both be aware of all the issues and the answers he was finding in his examinations.

Mr. Cook testified that he would not normally pass on information about requests from the defence, but that he has no obligation to withhold such information. It casually comes up in conversation with Crown counsel. Mr. Lucas testified that there was nothing wrong with Mr. Erickson advising the Crown that he had spoken to the defence, but that it was inappropriate to describe the nature of the conversations which occurred. He felt that it showed favouritism to the prosecution:

Q. And then, sir, another unusual thing in this case is, as you know, Mr. Erickson is apparently reporting to the Crown on his conversations with Mr. Pinkofsky, puts down the phone and picks it up and calls the Crown? I mean that surely demonstrates without any shadow of a doubt at all that Mr. Erickson had lost the neutrality that is necessary to an employee of the Centre of Forensic Science; doesn't it?

A. Well, neutrality is not the word I would use, and ...

Q. Objectivity — sorry.

A. No, not objectivity. Again, I think it was something, as I said yesterday, that I don't think he should have done, but I think I also made it clear that we deal with our client. Had you been our client in this case or in any other case, it would have been just as inappropriate for him to make that comment to someone else.

Q. I disagree with you. That's not what happened. I'm worried about what happened here, not talking about hypotheticals that happened in another circumstance.

A. Yes, as I said yesterday, that does trouble me.

Q. And I'm suggesting to you, sir, the reason that it's troubling is because it demonstrates that Mr. Erickson is not playing the role of the objective scientist, of a neutral scientist. He is showing clear favouritism to one side over the other.

A. To his client, yes.

Q. Yes. Well, that's what I was suggesting. His client, of course, was the Crown and police.

A. In this case, yes.

Despite this evidence, Mr. Lucas still felt that Mr. Erickson had not “crossed the line of objectivity” in the *Morin* case.

Ms. MacLean received a number of other phone calls from Mr. Erickson concerning the examinations conducted by a defence expert, Skip Palenik. Mr. Erickson advised her of Mr. Palenik’s attendances at the CFS and his opinions about the similarities of the various hairs. Mr. Erickson was not asked about these phone calls. Ms. MacLean again felt that Mr. Erickson had done nothing improper. When Mr. Morin was ordered to stand trial for a second time, the Crown was obliged to pay for any further scientific work done by defence experts. Ms. MacLean indicated that Mr. Erickson was simply keeping her abreast of Mr. Palenik’s further work. She also testified that Messrs. Erickson and Palenik knew each other quite well and were sharing all of their information.

(ii) Findings

I find that Mr. Erickson violated no existing policies or accepted norm in reporting to Ms. MacLean what the defence was doing and saying. However, this evidence does raise a systemic issue. The current CFS policy is that the defence is entitled to retain CFS analysts, but that a copy of any report generated must be forwarded to the prosecution. In other words, the defence enjoys no confidentiality when retaining the CFS. Of course, it follows that there is no policy of confidentiality where the defence questions a CFS analyst already working on the case at the instance of the authorities. Witnesses at this Inquiry suggest that this situation fosters the appearance, and perhaps the reality, of partiality. My later recommendations address this issue.

S. Competence, Training, Supervision and Review

The Inquiry explored the competence of CFS scientists, their training, and the nature and extent of their supervision and accountability. This section of the Report summarizes the evidence heard during Phase II on these issues. They were discussed in greater depth during the systemic phase of the Inquiry.

(i) Accreditation

In the 1980s and early 1990s, the CFS was not accredited by any outside body. In the 1970s, the American Society of Crime Lab Directors (ASCLD) established standards for accreditation of forensic science laboratories. The CFS was accredited in 1993. Mr. Lucas testified that accreditation is a difficult, expensive and time-consuming process, involving a lot of documentation. Once obtained, accreditation is reviewed by an external body every five years. In addition, the laboratory must participate in external proficiency testing, and conduct an internal review every year.³⁶ External proficiency testing requires examiners at the laboratory to complete mock case examinations, designed and administered by individuals outside of the lab. Internal reviews require the laboratory to review its operations and certify to the ASCLD that it continues to meet the standards of accreditation.

Although Mr. Lucas testified that accreditation was difficult to achieve, it produced many more changes to the documentation required than to the operations themselves. Very recently, the position of an overall quality manager for the CFS was created. The other changes were more incremental in nature.

Mr. Lucas testified that the amount of external proficiency testing increased with accreditation. Each examiner is now tested once a year. In 1985, they were tested about once every two years. The proficiency tests are not 'blind' tests, that is tests where the examiners do not know they are being tested. Mr. Lucas explained that although blind tests are preferable, they are difficult to produce and are generally detected by the examiners.³⁷

Mr. Lucas testified that there have always been systems of quality control and quality assurance in place at the CFS, although they have improved over the years and have been better documented since accreditation. He also noted that there have a number of changes to quality

³⁶ For some disciplines, such as DNA testing, the review is conducted externally, *i.e.* by an outside body.

³⁷ Mr. Cook testified that there is blind proficiency testing at his laboratory, but acknowledged that it is mostly internal testing. Mr. Lucas testified that external blind proficiency testing is preferable so that a range of laboratories can participate and norms can be established.

control procedures in the hair and fibre unit since the mid-1980s, such as the separation of items under examination, the use of different rooms to effect different examinations, and the reduction of potential contaminant ‘traffic.’

(ii) Ms. Nyznyk’s Training and Expertise

Mr. Lucas testified that in hiring a hair and fibre analyst, the CFS looks for someone with a minimum of a Bachelor of Sciences degree in biology or chemistry. Relevant work experience is considered, but it is rare to hire an experienced forensic expert from another laboratory. Once hired, the trainee is put through an apprenticeship program, working one-on-one with an experienced examiner. He or she initially works more as a technician than as an examiner, and then is gradually given increasingly complex exercises covering all the techniques that are used. A lot of reading material is assigned, covering the area of expertise, how to give evidence, and the organization of courts and government. He or she is given practical tests, and sometimes written ones as well. The trainee assists senior examiners on cases; goes with the examiners to court and testifies in mock court cases, with the last one being quite severe. The apprenticeship program lasts about two years. The trainee is subsequently provided continuing education. He or she is alerted to new literature, sent to relevant courses, and assigned to develop training manuals for new testing instruments. There are no periodic courtroom exercises, and courtroom testimony is only infrequently monitored, but the trainee’s first court cases are usually watched by a senior examiner.

Mr. Lucas testified that the training process at the CFS was state of the art in the 1980s. He further testified that the notion and importance of independence was introduced into every new employee’s mind from day one. Mr. Lucas himself specifically advised employees to inform counsel or the court if any relevant information does not come out at a trial. Mr. Erickson added that examiners were also taught not to overstate their evidence in court. Contamination issues, however, were not included in the training curriculum, although they are now.

Ms. Nyznyk testified that she joined the biology department at the CFS in 1979. She was trained in-house by Mr. Erickson on all the aspects of hair and fibre analysis. She also took some courses outside the CFS. Ms. Nyznyk confirmed that she participated in a mock court process. She said she

was taught how to answer questions arising out of her report.

Ms. Nyznyk testified that she was first allowed to examine her own hair and fibre evidence in a criminal case in 1981. Before the *Morin* case, she testified as an expert in cases before the Ontario courts, including a first degree murder case, and worked on more than one homicide case. She also attended some further courses outside the CFS. She did not write any academic papers, but did write the CFS manual for the MSP machine.

Mr. Erickson testified that he had no concerns regarding Ms. Nyznyk's training or professionalism in 1985. She received two letters of commendation and Mr. Erickson never heard that she was not doing her job. Mr. Lucas testified that he never had to discipline Ms. Nyznyk for overstating her evidence,³⁸ but that there were some concerns regarding the management of her workload; she needed advice on staying focussed, keeping her work organized and getting it out on time. Ms. Nyznyk testified that she always succeeded on her proficiency tests, and Mr. Lucas confirmed that the tests never identified Ms. Nyznyk as a suspect scientist.

Findings

In my view, Ms. Nyznyk demonstrated significant inadequacies as a scientist. This had more to do with the lack of scientific rigour associated with the significance she attributed to her findings and with a lack of objectivity and impartiality than with her laboratory work. It is easier to monitor, supervise and review technical laboratory work. It is far more difficult to design an effective means to prevent partisanship, the overstating of evidence and loose and misleading language in the context of a criminal proceeding.

I heard some evidence relating to another case where a CFS hair analyst significantly overstated evidence in a criminal prosecution. With all due respect to Mr. Lucas, who was questioned about this event, I was unimpressed with the CFS' response to that situation. I found that the CFS demonstrated a lack of introspection about its own work and a resulting lack of effective supervision and accountability. My later recommendations address this issue.

³⁸ He never had to discipline Mr. Erickson either.

(iii) Assignment of Cases

The question arose during the proceedings as to how Ms. Nyznyk became the principal forensic biologist involved in Mr. Morin's case. The Commission heard evidence that in the mid-1980s case work was assigned primarily on the basis of workload and not on the basis of seniority or expertise. Mr. Lucas testified that since there were only two people in the hair and fibre unit, and both were considered competent, Mr. Morin's case would have been assigned to the person with less work. Mr. Erickson confirmed that Ms. Nyznyk was considered competent to work on homicide cases.

Ms. Nyznyk testified that there was no system at the CFS in the 1980s that would have assigned a senior analyst to a particularly serious homicide case. Mr. Erickson testified that no thought was given to allocating cases in that way. He stated that the nature of the work was basically the same in homicides as in other cases, and an examiner only needed sufficient experience in court. Mr. Lucas confirmed that the seriousness of a case was less significant to the CFS than the difficulty of the examinations required. He noted that very simple examinations might be required in a very serious case.

(iv) Peer Review

The issue of peer review arose at the Inquiry. Peer review refers to the review of an examiner's work by another competent scientist before a final report is prepared. Much of the evidence heard by the Commission dealt with the systemic issue of whether there should be mandatory peer review of findings in a subjective science like hair and fibre analysis. Some of the evidence, however, addressed whether there was any peer review of Ms. Nyznyk's findings in the *Morin* case.³⁹

Ms. Nyznyk gave very limited evidence on this issue. She simply said that Mr. Erickson reviewed and initialled every report in the *Morin* case. The evidence of Mr. Lucas, however, made clear that there is more than one type of peer review. Mr. Lucas referred to three. First, there is an administrative

³⁹ All of Ms. Nyznyk's findings were ultimately reviewed by Mr. Erickson in the late 1980s, when he became involved in the case after Ms. Nyznyk became ill. The evidence below refers to the peer review at the time of Ms. Nyznyk's original examinations.

review, which he defined as a review “of the documentation looking at the case submission form to see what was involved, what sort of examinations were requested or required, were they done, does the report reflect the nature of the work that was done, and does the report appear to be consistent with that, and with professional standards.” The second type of review is a technical review, which Mr. Lucas defined as “going through the entire case file and looking at the notes, looking at the charts, looking at whatever documentation is there, making sure that the appropriate documentation is there,” and “to determine if that person could determine from reviewing those notes, that they could arrive at the same conclusion that was expressed in the report.” Third, there is an actual re-examination of the findings. Neither of the first two types of review involve a re-examination of the findings. Mr. Lucas and Ms. Nyznyk indicated that re-examination only occurred occasionally. Mr. Lucas believed a technical review was done of the majority of cases in the biology section.

Mr. Erickson agreed with Ms. Nyznyk that he reviewed her reports, but gave somewhat confusing evidence on the nature of the reviews he conducted. He initially testified that he only conducted a type of administrative review: he looked at what the report was saying and whether the language was correct. He indicated that the reports were not subjected to a technical review.⁴⁰ However, Mr. Erickson later testified that he did conduct a technical review of Ms. Nyznyk’s reports, and thought her notes reflected her reported findings:

Q. So I hadn’t understood it until just now, so you’re saying you did not only an administrative review in the Guy Paul Morin case, but also a technical review of her work?

A. Well, I usually go through most analyst’s reports, be it this case or any other case, just to see what the notes are, and the technical findings to see that they do support. Analysts come in and talk to be about it in

⁴⁰ Mr. Erickson did not actually use the terms ‘administrative review’ or ‘technical review.’ However, his evidence seemed to make clear that he was referring to the actions described in those terms by Mr. Lucas. For example, he appeared to use the term ‘peer review’ to refer to a technical review. Mr. Erickson defined peer review as “somebody else should be able to pick up that file, and without actually redoing all the work, should be able to go through that file, and draw the same conclusions from materials within that file, and reach the same conclusion that the initial examiner had made.”

terms of their notes, and discuss what should be done or what shouldn't be done, to support their conclusions, so there is ongoing dialogue in terms of these cases.

Mr. Erickson testified that Ms. Nyznyk did not discuss her findings or conclusions with him.

Finally, Mr. Erickson testified that he never conducted a re-examination of Ms. Nyznyk's findings until he himself became involved in the case. Mr. Lucas testified that a technical review can involve a re-examination of some items, and that he would have expected Mr. Erickson to have done that in Mr. Morin's case. In particular, Mr. Lucas stated that he would have expected Mr. Erickson to have re-examined the necklace hair.

Whatever peer review was conducted by Mr. Erickson in the *Morin* case, it failed to address the real problem here: the significance given to the hair and fibre comparisons, rather than the laboratory work itself. Indeed, for the reasons already given, Mr. Erickson's conduct was itself flawed. My later recommendations draw upon the lessons learned from this case.

(v) Lost Evidence

A number of items of evidence in Mr. Morin's case were lost at the CFS before the second trial. These items included four hairs, some of Ms. Nyznyk's work notes and work sheets, and all the 150-200 hair and fibre slides that were not made exhibits at the first trial, including the slides made by Ms. Stefak in her 1985/1986 re-examination.

Ms. Nyznyk testified that she did not know how the evidence was lost. She last left the slides wrapped within a cardboard box, which was usually kept in a back storage room on the third floor of the CFS. She discovered they were missing just before the second trial when she looked for them in the storage room.

Mr. Erickson offered a potential explanation of how the slides might have disappeared. In the 1980s, a bio-hazard room was constructed in the biology section, and during the course of construction, materials were removed from the section. Mr. Erickson suggested that the *Morin* items may have been removed at that time, and somehow lost in the process. Mr. Erickson acknowledged that only items associated with the *Morin* case were

missing.

But this, he said, was an isolated incident. Mr. Lucas confirmed that it was a very unusual, if not unique occurrence.

Mr. Erickson acknowledged that he did not immediately inform the Crown attorneys that the evidence was missing. He initially thought he informed them in an October 1988 meeting, but subsequently accepted the accuracy of a note written by Ms. MacLean, reflecting that the prosecutors were first advised on October 2, 1990. Mr. Erickson could not explain why he did not inform the prosecutors until that time.

When Ms. Nyznyk discovered that the items had been lost, she did not advise either Detective Fitzpatrick or Inspector Shephard. The issue first came up in a meeting with the prosecutors. Ms. Nyznyk did not advise the prosecutors at that meeting, however, that any of her work sheets were missing. This first came up in her cross-examination at the second trial.

Findings

The loss of evidence should have been reported to the prosecutors in a timely way. It was not. I do not find that the loss of this evidence demonstrated any malevolence on the part of anyone at the CFS.

(vi) Workload

Evidence was adduced before the Commission concerning the quantity of work assigned to the CFS in the mid-1980s. It was clear that the CFS, and, most particularly the hair and fibre unit, was saddled with a heavy workload. It is also clear that hair and fibre comparisons take a substantial amount of time. As reflected earlier, there was a concern in the 1980s about how Ms. Nyznyk was managing her workload.

Mr. Erickson testified that the CFS was in bad shape in terms of resources in the 1980s. There was a heavy workload and tight deadlines. Mr. Lucas concurred that there was insufficient staff at the CFS, and that a backlog developed. In the hair and fibre unit in particular, Mr. Erickson was trying to increase the number of personnel. At the time, he and Ms. Nyznyk were the only specialists in trace evidence, although they were assisted by

two assistants and one trainee.

Ms. Nyznyk testified that there were time constraints in Mr. Morin's case. She was overworked, and there was no one available to offer relief. Mr. Morin's case was not the only one she had to work on. She normally had to juggle 15 to 20 cases at the same time.

Ms. Nyznyk testified that despite the workload, she carried out, as best she could, all the examinations she thought were useful. She acknowledged that she did not conduct a comparison between the necklace hair and hairs from Christine Jessop's classmates. She further acknowledged that her examinations had only been partially completed by the time of Mr. Morin's preliminary inquiry. She felt this was partly a result of her workload and partly a result of material not being submitted for analysis quickly enough. Ms. Nyznyk said she was not aware that Mr. Morin's trial once had to be adjourned because she had not yet completed her examinations.

Mr. Scott ultimately wrote a letter to Mr. Erickson on February 26, 1987, complaining about Ms. Nyznyk's pace of work and alleging, *inter alia*, that she had failed to produce some demonstrative aids when he had requested by the time of the first trial. This letter was substantially reproduced earlier in this Report. Mr. Erickson testified that before receiving the letter he had not known about any problems with Ms. Nyznyk's pace of work. He had spoken to Mr. Scott before receiving the letter, and did not recall Scott expressing any concerns over how the case was proceeding. Ms. Nyznyk also did not discuss the problems with him. Mr. Erickson testified that he would have tried to address the problems had he been aware of them.

Ms. Nyznyk agreed that she had not discussed her time constraints with Mr. Erickson, explaining that he, too, was busy. Mr. Scott testified that the letter came about as a result of a complaint by Inspector Brown to Mr. Erickson about Ms. Nyznyk's slow pace. Mr. Erickson called Mr. Scott about the issue and asked him to put his concerns on paper, and hence the letter. Mr. Erickson ultimately accepted that Mr. Scott's evidence might be correct.

Mr. Scott also alleged in his letter that he and the police had often spoken to Ms. Nyznyk about their concerns over an impending trial for a man in custody. Ms. Nyznyk testified that she had not been aware of the pressure on the prosecution to move quickly with an in-custody accused.

Ms. Nyznyk did claim that she was pressured to perform the examinations quickly. She further testified that the pressure came from two sources: the police and Mr. Scott.

Ms. Nyznyk stated that Mr. Scott “was calling and pressuring and wanting everything done yesterday.” Mr. Scott acknowledged that he was pushing Ms. Nyznyk to get the examinations completed. Ms. Nyznyk said she explained to Mr. Scott many times that trace evidence analysis is very labour intensive and cannot be rushed. Ms. Nyznyk testified that Mr. Erickson also ultimately expressed the same message to Mr. Scott. As reflected above, Mr. Erickson testified that he did not recall speaking to Mr. Scott about the speed at which Ms. Nyznyk was proceeding, at least until after he received the letter of February 1987.

As noted earlier in this Report, Ms. Nyznyk testified that Detective Fitzpatrick and Inspector Shephard gave her more attention prior to the first trial than she had ever received from other police officers. Ms. Nyznyk testified that most people wanted work done immediately, but they usually left her alone once she spoke to them. Detective Fitzpatrick and Inspector Shephard, were more persistent in wanting to know the results. Ms. Nyznyk testified that while there was nothing wrong with this, it was frustrating because she could not work while she was spending time talking to the police.

Detective Fitzpatrick testified that he and Inspector Shephard attended at the CFS several times to learn of the progress on the case, only to be told that Ms. Nyznyk had not yet started work on it. He discussed the slow pace of the work with Mr. Scott. Inspector Shephard testified that he may have expressed concerns to the Crown attorneys, Ms. Nyznyk or her superior concerning the pace of Ms. Nyznyk’s examinations and the fact that she was overworked.

Mr. Lucas testified that the CFS dealt with complaints about delay, particularly from police officers, on a daily basis. Mr. Erickson testified that police officers often inquire into the progress of examinations and why they are not proceeding more quickly. Crown counsel also frequently ask that their case be given priority or that the examinations be hurried. Mr. Erickson felt that the *Morin* case was no different than any other in terms of pressure to get work done on time.

Mr. Scott wrote in his letter of February 26, 1987, that he and the police were concerned that if they continued to pressure Ms. Nyznyk, the evidence that might be found would be lost. Ms. Nyznyk testified that she did not know what Mr. Scott was trying to insinuate. Mr. Scott explained that he meant that Ms. Nyznyk appeared to be sick, and he was concerned that she was not going to be physically able to complete her work.

Findings

I have already found that there was no impropriety on the part of Crown counsel or the investigators in attempting to get the work done in a timely way. No doubt, the investigators' attendances may have exacerbated, rather than relieved, Ms. Nyznyk's time constraints. Much of the work performed by CFS analysts and technicians is labour intensive and must be done with painstaking accuracy. Time constraints are always operative — for lawyers and for scientists. However, overloading through excessive workloads is an invitation for error. It can contribute to the conviction of the innocent and the exoneration of the guilty through sloppy or incomplete science. A recent survey of Ontario prosecutors suggests that the backlog at the CFS remains a critical problem. This issue is more extensively discussed in my review of the systemic evidence below.

T. 'Indications of Blood'

(i) Evidence of Robert White

Robert White, a forensic analyst with the Centre of Forensic Sciences, was called as a witness for the prosecution at both the first and second trials. He was an expert in serology (that is, bodily fluids). His testimony related to examinations he conducted on Christine Jessop's clothes for bodily fluids, including blood, and on the Morin Honda for blood.

He testified that testing for human blood is conducted at three levels.⁴¹ The first and lowest level is a phenolphthalein test in which a filter paper is rubbed on the item to be tested. After the addition of chemical reagents, a pinkish tinge on the paper means there is an *indication* of blood.

⁴¹ This evidence assumes that DNA testing is unavailable.

A second level of testing, the Takayama test, is conducted to confirm the substance to be blood. However, if the quantity or the quality of the substance is inadequate, the result will be inconclusive.

The third level of testing, the Precipitin test, determines whether the blood is of human origin. If enough blood is available, blood grouping can be done.

Mr. White testified that upon examination of Christine Jessop's clothing, he found no blood on some items, but identified heavy human blood stains on others, including the left sleeve of her blouse. In addition, Mr. White found 'indications of blood' on both pairs of socks and on various areas of the blouse. Mr. White did not conduct further testing on the indications of blood found on portions of the blouse and the socks in order to determine if human blood could be identified. Further, there was no attempt to group the identified human blood on the sleeve as comparison samples were not available.

More importantly, Mr. White also testified as to the results of his examination of the Morin Honda. The phenolphthalein test produced a positive reaction in three areas of the Honda, but the quantity of the substance detected was insufficient to enable its identification as blood. Therefore, there remained only 'indications of blood' in the vehicle. These indications were found on the steering wheel and interior driver's door handle and on two areas near the centre of an eight inch long rusty metal rod found in a tool pouch in the hatchback. Mr. White testified that his notes reflecting 'very weak' areas on the steering wheel and door handle did not mean there were very weak indications of blood, only that the small quantity of stain meant that it took longer for the pink colour to appear.

Mr. White found no indications of blood on any of the four seat covers found in either the car or the Morin residence, nor did he find indications on Mr. Morin's pocket knife.

The stains in the Honda were not visible to the naked eye. It could not be determined whether the indications of blood were animal blood or human blood, whether they emanated from a rare cut of meat, fish blood, a squashed mosquito (which had ingested blood within a reasonable time) or dog saliva (if, for example, the dog had been chewing on a bone with raw flesh attached). No blood typing was possible and the age of the substance could

not be determined.

The Honda was driven principally by Guy Paul Morin, but was occasionally driven by Alphonse Morin. It had also been driven by Guy Paul Morin's siblings before they moved out of the family home.

(ii) Defence Motion to Exclude

Mr. White's evidence of 'indications of blood' in the Honda was ruled admissible after a defence motion to exclude it during pre-trial motions before Donnelly J.

The defence position was that this evidence was not probative and that it invited the jury to draw speculative and prejudicial inferences, most particularly that the substance was Christine Jessop's blood. Such an adverse inference would be powerful, the defence said, in light of the scientific nature of the evidence and the 'aura of authenticity' emanating from the status of the Centre of Forensic Sciences.

The trial judge found that the probative value of the evidence substantially exceeded the potential prejudicial effect and that proper jury instructions would address the defence's concerns.

In his ruling, His Honour considered other links between the Honda and Christine Jessop which, taken in conjunction with the indications of blood, might connect Guy Paul Morin to the crime. In particular, he referred to the three hairs found in the Honda which were described as being 'consistent' with Christine Jessop's hair and he referred to the fibres in the car which were similar to fibres found on Christine Jessop's clothing.

The trial judge also noted other circumstantial evidence in the case, including the necklace hair, fibres found in the Morin residence which were similar to fibres associated with Christine Jessop, as well as Mr. Morin's alleged statements to Mr. May, and overheard by Mr. X. The trial judge also noted that the Crown was applying to lead Sergeant Hobbs' evidence as to further utterances by Mr. Morin. (This application was ultimately unsuccessful.)

I should note that the trial judge also approached the reception of other evidence on this basis. For example, in admitting Constable

Robertson's evidence that his dog detected Christine Jessop's scent at the Morin Honda, the trial judge noted:

The evidence of the actions of the dog is not the only evidence linking Christine Jessop to the Honda car. There is also the scientific evidence of hair and fibre. The weight to be given to the dog scenting evidence must be considered in the context of the entirety of the Crown's case.

Further, in ruling that the 'necklace hair' evidence was admissible, Donnelly J. concluded that

[t]he jury may then assess the probative value of the opinions about the hair comparison in light of other evidence at the trial. The evidence of the similarity of the hairs was tendered in the context of a predominantly circumstantial case as follows:

- 1) The necklace hair was, in Miss Nyznyk's opinion, *consistent* with having originated from the accused.
- 2) Similar fibres were found
 - a) On the deceased's recorder and in the Honda automobile which was normally operated by the accused and which had been driven by him on October 3, 1984.
 - b) On the deceased's running shoe and in the Honda automobile.
 - c) On the deceased's sock and in the Honda automobile.
 - d) On the deceased's jean pants and in the Honda automobile.
 - e) On the deceased's sweatshirt and in the Honda automobile.
 - f) On the deceased's turtleneck and in the accused's home.
 - g) As well, there was a match of animal hair

found on the deceased's turtleneck sweater and on the living room rug of the accused's home.

- 3) Three hairs *consistent* with originating from the deceased were found in the Honda automobile.
- 4) *Indications of blood were detected on the driver's door, the steering wheel, and on a piece of metal from the hatchback trunk of the Honda automobile.* (Emphasis added.)

(iii) Closing Addresses

In his closing address, Mr. Pinkofsky submitted that the 'indications of blood' evidence was a sign of Mr. Morin's innocence, given the absence of any finding of blood when one would expect abundant traces had Mr. Morin been the killer. Indeed, it was submitted, that indications of blood in an unclean and messy car would be normal.⁴²

In the Crown's closing, Mr. McGuigan suggested that the indications of blood evidence took on meaning when considered in conjunction with the other evidence connecting the Honda to the crime:

[I]n addition to the hairs and fibres there was one other kind of trace evidence found in the car and that was blood, indications of blood.

Mr. White found indications of blood in one of the quarters of the steering wheel and there was also indications of blood detected on the inside driver's door handle. It was Mr. White's opinion that if fresh, liquid blood was present on a person's hands and he gripped the steering wheel and the door handle, it might be possible to detect traces of that blood even if those surfaces were examined a substantial period of time later.

Ladies and gentlemen, I acknowledge that on its own this evidence of indications of blood in the car is not of

⁴² In a taped conversation with Mr. May on July 1, 1985, Mr. Morin, in reference to this evidence, indicated that he could guarantee the 'blood' was his. He suggested that when working on the car engine his knuckles could be cut.

great significance. I submit, however, that it has to be considered in the context of the hair and fibre evidence which links the vehicle to Christine Jessop and in that sense it is capable of having significant probative value.

Mr. McGuigan could not recall, at the time of his evidence at the Inquiry, whether he discussed with Mr. White the significance of the evidence. He did not discuss with Mr. White the likelihood of finding such microscopic indications in other vehicles, but expressed his own view at the Inquiry that it would be rare to find such indications in other vehicles in those same areas.

Mr. McGuigan was asked by his counsel how he would feel had he not led this evidence and defence counsel suggested in closing that there was not a scintilla of blood in the Honda when one would expect there to be some. He replied he would have been very unhappy had that happened.

(iv) Charge to the Jury

The trial judge directed the jury that the evidence of indications of blood,

standing by itself is of limited weight. That evidence must not be a foundation for unreasonable inferences or speculation.

[The evidence] should be viewed in the context of the whole of the evidence. In considering the probative value of that evidence, you may consider the interior driver's door handle and the steering wheel are areas that would be touched in the normal course of entering and operating the vehicle.

In reviewing the defence position, the trial judge said:

- The untidiness of the Honda car upon seizure April 22, 1985 is said to indicate nothing untoward happened in the car and there was no need to clean the interior.
- The indications of blood on the Honda detected by

Mr. White are consistent with normal use of a family car and are unrelated to Christine Jessop. The absence of any further indications of blood in the car is inconsistent with that car being used by the killer.

(v) Potential for Misuse

One of the dangers of presumptive test evidence is its potential for participants in the criminal justice system to allow the evidence to take on a meaning beyond that which is actually expressed by the scientist. In his closing submissions (on the dog scent discrimination evidence), for instance, Mr. McGuigan referred to the ‘indications of blood’ as ‘blood’:

I respectfully submit that this dog evidence, if I can refer to it as that, takes on much greater significance in the light of all the other circumstantial evidence connecting the accused’s car to this crime. That is the hairs, the fibres, the *blood* and the reaction that Paddy Hester got from the accused when she tried to search the same vehicle and the same door. (Emphasis added.)

And later, in dealing with various ‘coincidences’ pointing to Mr. Morin’s guilt, “Isn’t it a coincidence that *traces of blood* were found on the door handle and on the steering wheel of that same Honda motor vehicle?” (Emphasis added.)

At the Inquiry, Inspector Shephard testified that he thought there was some significance to “the fact that there was blood” in or on the car. In interviewing Paddy Hester, a potential Crown witness, Detective Fitzpatrick told her about the “remnants of blood” on the steering wheel and door handle of the car.

Ms. MacLean, too, in her evidence at the Inquiry, referred to the “trace evidence of *blood*” and the “*blood* in the car” having limited probative value. She said the jury was told that it could not be determined whether it was even “*human blood*”:

But the fact that it had limited probative value didn’t mean there was no reasonable basis in the evidence for them to infer it might be *human blood*. The scientist said it could be human blood, or it could be something

else. (Emphasis added.)

Mr. McGuigan at the Inquiry expressed his understanding that while the evidence, alone, meant nothing,

[w]hat this evidence did show is that there was *blood*, as I recall it, in the crevices of the wheel, and in the door handle, which were not visible to the eye, but reacted to whatever they do to test for it.

In addition, there was *blood* on some instrument that was in a box, some kind of a tool or something of that nature ... And so it would be an indication that someone who had blood on their hands could have deposited that in those particular areas. (Emphasis added.)

Mr. Erickson was asked, on the basis of his experience in serology, whether the 'indications of blood' incriminated Mr. Morin. He told the Commission:

A. Possibly.

Q. All right. How?

A. Well, that's the amount that's left after this occurred. But for it to stand on its own, I'd have to say not.

.....

Indications of blood to me as a scientist means that blood *could be* present. (Emphasis added.)

He also acknowledged, however, that to him, 'indications of blood' evidence did not mean "a whole lot." He was troubled and probably shocked by Mr. McGuigan's submissions to the jury that the 'indications of blood' evidence, coupled with the hair and fibre evidence, were capable of having significant probative value.

Roger Cook said that from time to time the U.K. Forensic Science Service reports presumptive testing, but added that "[it] can be misleading on occasions, and ... if it's going to be used, it should be used, but heavily qualified, perhaps." Mr. Lucas' opinion was that "preliminary tests have a

value, but ... their limitations have to be expressed.”

(vi) Findings

Mr. White fairly outlined his findings and their limitations. The prosecutors, having obtained a favourable ruling from the trial judge, as they did with the hair comparison evidence, were entitled to put the evidence before the jury. The real issues here relate to the correctness of the trial judge’s ruling and the systemic issues which follow: should first stage or preliminary testing that yields nothing more than ‘indications of blood’ be admissible at the instance of the prosecution as circumstantial evidence of guilt? Does it acquire sufficient probative value for admission because of the existence of other evidence of the accused’s guilt? These issues are addressed in the systemic evidence and in my recommendations, which immediately follow.

I agree that, had the defence asked the jury to draw an inference that Christine Jessop had not been in the car because there was no blood in the Honda, the prosecution would have been entitled to lead Mr. White’s evidence to potentially negate that inference. Of course, that was not the basis for the trial judge’s ruling, given at the outset of the trial. In other words, where the prosecution does not lead evidence, the defence can, by its conduct, ‘open the door’ to its reception.

U. Forensic Pathology

(i) The Autopsy

On January 2, 1985, between 10:12 a.m. and 12:25 p.m., an autopsy was performed on the remains of Christine Jessop, led by Dr. John Hillsdon-Smith, then the chief pathologist at the Coroner’s office and who is since deceased. Dr. Hillsdon-Smith was assisted by Barry Blenkinsop, his chief assistant, and Alison Collins, a student pathologist.

Dr. Hillsdon-Smith found the cause of death to be multiple stab wounds to the chest. He based his conclusion on the fact that there were cuts in the ribs overlying vital organs in the chest. Due to the advanced state of decomposition of the body, he was unable to say whether a sexual assault had

taken place. Dr. Hillsdon-Smith did not testify at the first trial. At the second trial, he testified that he observed nothing inconsistent with death having occurred three to four months prior to the autopsy.

During the autopsy, some rib bones were found in the soil on the board on which Christine's remains were transported to the morgue, and another rib bone was found in the soil collected from the ground beneath her remains.

There were no animal teeth impressions on any bones Dr. Hillsdon-Smith examined. At the second trial he testified that he did not have experience in identifying animal bites into muscle but his observations of the soft tissue suggested to him that there had been animal activity.

Dr. Hillsdon-Smith noted the following internal injuries:

1. two bruises in the left mid-frontal area of the scalp (blunt impact injuries);
2. a cut on the fourth lumbar vertebrae (just below the small of the back);
3. a V-shaped cut in the seventh right rib;
4. a superficial cut on the eighth right rib;
5. a V-shaped cut on the eighth left rib. Associated with this cut was a superficial crack feature;
6. a V-shaped cut on the sixth left rib.

Dr. Hillsdon-Smith concluded that the injuries were consistent with having been caused by a one-edged sharp knife, not more than half an inch wide. He could not provide an opinion as to the length of the blade.

Dr. Hillsdon Smith retained the four ribs and lumbar vertebrae to which he had noted injury. On February 2, 1989, he turned these bones over to Sergeant Chapman and Inspector Shephard. The latter signed a receipt for them. Dr. Hillsdon-Smith discarded two femur (thigh) bones after certain testing was conducted on these bones.

Dr. Hillsdon-Smith did not conduct an inventory of the bones. He explained at the second trial that once he formed an opinion as to the cause of death, he decided not to strip the bones of the flesh for examination, a process which would have delayed by a week the return of the remains to the next of kin.

(ii) Additional Findings

On January 4, 1985, Sergeant Michalowsky returned to the body site and found two more bones. He described the bones as:

1. a curved bone similar to a rib bone; and
2. a bone similar to a cervical (neck) bone.

Dr. Hillsdon-Smith testified at the second trial that he could not recall these bones being delivered to him for examination, nor was there any record of these bones being received by the pathology section.

On May 10, 1985, the Jessops found a number of bones at the body site and took them to the Durham Regional Police where Constable Lorne Annis took possession of them. Constable Harry Shephard of the Identification Unit examined these bones and delivered them to the Centre of Forensic Sciences.

On May 15, 1985, six bones were received by Dr. Hillsdon-Smith from the Centre of Forensic Sciences. Dr. Hillsdon-Smith concluded⁴³ these bones were:

1. the right ninth rib;
2. the upper thoracic vertebra;
3. part of the neural arch (from the spine);

⁴³ In 1990 Dr. Snow identified the bones found by Jessops as four bones; the 5th and 6th thoracic vertebrae (the 6th thoracic vertebrae was in three pieces), a right rib and one phalanx (finger bone). It would appear that it became apparent that three of these bones constituted one (albeit incomplete) vertebrae only upon reconstruction by Dr. Duckworth, an anatomist, in 1990.

4. a fragment of the vertebra;
5. a fragment of an unidentifiable bone; and
6. a finger bone

There was no evidence of injury on any of these six bones.

(iii) Archeological Excavation

In September 1990, Katherine Gruspier and Grant Mullen, physical anthropology graduate students, were retained by the Ministry of the Attorney General to conduct an archeological excavation at the body site to determine whether there were further bones at the site or any other burial sites close by. A 30 square metre excavation was completed on October 30, 1990, which included the area identified as that where the body was found and the depression in which the Jessops had found bones on May 10, 1985. No further bones were found in the course of the excavation.

(iv) The Exhumation and Further Examinations

On October 30, 1990 the remains of Christine Jessop were exhumed for the purpose of making an inventory to determine whether the bones found on May 10, 1985 were part of Christine Jessop's skeleton.

On October 31, November 1 and part of November 2, 1990, Dr. Clyde Snow, a forensic anthropologist, examined the bodily remains. Dr. Jerry Melbye, a forensic anthropologist retained by the defence, and Ms. Gruspier and Mr. Mullen, students of Dr. Melbye, were present.

After conducting a bone inventory, Dr. Snow formed the opinion that all of the bones, including those found by the Jessops on May 10, 1985, belonged to a single skeleton which had been identified as that of Christine Jessop. He concluded that 94 percent of the bones could be accounted for. Eighty-seven and a half percent were present at the time of the examination. Other bones could not be located, including the bones found by Sergeant

Michalowsky at the body site on January 4, 1985,⁴⁴ the discarded femur bones, and the bones retained by Dr. Hillsdon-Smith after the first autopsy which had been returned to the Durham police. Dr. Hans Sepp and Dr. Clyde Snow examined slides of the latter.

During the course of the inventory, it became apparent that a number of injuries had not been described at the original autopsy. Snow also concluded there had been some confusion in Hillsdon-Smith's identification of the 2nd lumbar as the 4th and of the 3rd rib as the 6th. Dr. Snow was of the view that forensic pathological expertise was required to further interpret this evidence. On November 1, 1990, Dr. Sepp, a forensic pathologist, examined the remains at the request of Dr. Young, the Chief Coroner of Ontario.

Dr. Sepp agreed with the conclusion of Dr. Hillsdon-Smith at the first autopsy that the cause of death of Christine Jessop was stab wounds to the body. The injuries he observed were consistent with having been inflicted by one instrument with a sharp cutting edge and a pointed end. He, too, believed there had been animal involvement with respect to the remains for the reason that part of the skin and muscle of the thighs was missing. Dr. Sepp and Dr. Snow made the following findings which had not been noted at the first autopsy:

1. nasal bone fractures consistent with the application of blunt force. Dr. Sepp opined that while great force is not required to fracture nasal bones, the degree of force required to produce the injuries was sufficient to have caused unconsciousness;
2. a lesion on the lateral aspects of both the left second rib and right second rib;
3. complete severance vertically of the sternum in the upper part of the breast bone;
4. injury to the sixth thoracic (rib-bearing) vertebrae. A horizontal plane of this vertebrae was missing;

⁴⁴ Dr. Snow concluded that the bone which Sergeant Michalowsky described as a cervical vertebrae was, in fact, a thoracic (rib-bearing) vertebrae.

5. multiple cuts on the upper five cervical (neck) vertebra. Dr. Snow described these cut marks as “very, very subtle.” Dr. Sepp testified that these injuries were consistent with an unsuccessful attempt to sever the head from the body; and
6. a cut just above the wrist on the right forearm between the radius and the ulna bones (the two forearm bones). All experts concluded this “nick” was the result of an accident during cleaning of bones as it was not detected on X-rays taken prior to the examination.

There was disagreement amongst the experts as to the nature and cause of some of the injuries evident to the bones.

In his evidence at the second trial, Dr. Hillsdon-Smith testified that he did not detect certain injuries because, as indicated above, he ended the examination once he had determined the cause of death. However, he readily admitted that he was remiss in failing to detect, at the first autopsy, the fracture of the nasal bone and severed sternum.

(v) Findings

Dr. Hillsdon-Smith made some errors during the initial autopsy. He conceded that this was so at the second trial.

The injuries identified after the exhumation bore some relevance to the defence, as did the fact that all bones located at the body site emanated from Christine Jessop. For example, the defence alleged that the extensiveness of the injuries identified after the exhumation demonstrated that the perpetrator spent a substantial period of time at the body site which, in turn, made it less likely that Guy Paul Morin (given his presence at the family home) was the killer. It is unnecessary to assess how significant this evidence was to the defence. It had been fully noted by the time of the second trial. Accordingly, the inadequacies of the first autopsy did not contribute to the wrongful conviction.

V. Systemic Evidence and Recommendations

(i) Overview

I have found, *inter alia*, that:

- the hair and fibre comparisons properly understood, had little or no probative value in demonstrating Mr. Morin's guilt;
- the limitations upon scientific findings were not accurately or adequately communicated to police, prosecutors, the defence and to the Courts;
- scientific findings were overstated at times;
- original evidence was contaminated while in the possession of the CFS;
- the evidence of contamination was suppressed; it was not revealed to the police, prosecutors, the defence or to the courts;
- potentially exculpatory evidence was not drawn to the attention of the authorities;
- original evidence was lost;
- there was, at times, a loss of objectivity, inconsistent with the proper role of a forensic scientist;
- The CFS may have failed in its duties during the appellate process as well.

Dr. Young apologized to Guy Paul Morin for anything that CFS did

to contribute to his wrongful conviction.⁴⁵ The contribution of the CFS to Mr. Morin's wrongful arrest, prosecution and conviction was, indeed, substantial.

Hair and/or fibre evidence:

- elevated Guy Paul Morin to prime suspect status;
- formed the justification, in large measure, for his arrest;
- formed the justification, in large measure, for the searches of his car and home;
- was cited by the Crown to support his detention pending trial;
- was cited by the Ontario Court of Appeal and Supreme Court of Canada as evidence relevant to their consideration of whether his acquittal should be overturned;
- formed a substantial part of the case against Guy Paul Morin at his first and second trials;
- undoubtedly was relied upon by the jury to convict him at the second trial;
- up until the revelations at this Inquiry, was undoubtedly cited by some as support for the position that Guy Paul Morin was guilty, even after the DNA results were obtained.

I have no doubt that the public's confidence in the Centre of Forensic Sciences has been damaged by the revelations at this Inquiry. The evidence before me also demonstrates that the confidence that participants in the administration of criminal justice may have had in the Centre has been

⁴⁵ Of course, none of these findings are attributable in any way to Dr. Young, the present Assistant Deputy Solicitor General, Public Safety Division, whose responsibilities extend to the Centre.

eroded. One senior Crown counsel, Steven Sheriff, said this:

I must say, this Inquiry has opened my eyes, and has quite frankly horrified me to realize how vulnerable we all are, Crown and defence, to the experts. We have no way of really being able to second-guess their testing, or even, quite frankly, to really understand its deficiencies, and to think that experts would not reveal to us significant data is really quite scary. I hope and trust this is isolated, but it really means that we, then, are the victims; we, Crown or defence, can become the victims of the experts.

.....

Well, we have to be wary now. We weren't wary before. We have to be wary now; our new directive represents progress on this regard. We have to make it crystal clear to the expert that we're not asking for anything more or less than the truth and objectivity, and it's a new day out there. We would be fools to take it for granted the way we used to. I'm still in shock; I mean, I look at all the cases over time when the experts were fully worthy of trust, and I've had so many of those, and this is real revelation to me.

But we've got to learn from experience, and we've got to be careful of this type of evidence. We haven't been traditionally in the past, and that's how we can be victimized. So it's a new era.

Brian Gover, Crown counsel at the stay motion which preceded Mr. Morin's second trial, reflected this:

[A]s a prosecutor, I'd grown up with the notion of the infallibility of the Centre of Forensic Science.

.....

[I]n my view, clearly, the Centre did not deserve the confidence which the prosecution had placed in it in its analysis of the hair and fibre evidence in this case.

The Durham Regional Police Service Board commented as follows

in its written submissions:

We submit that the damage that has been done to the good reputation of the Centre of Forensic Sciences cannot be overstated. It is not only the damage done in this case, but the subterranean effects of a general lack of confidence among the police community, prosecutors, defence bar, judiciary and the public at large which is so worrisome.

Everyone must be able to rely on the complete integrity, objectivity and accuracy of the Centre of Forensic Sciences if the Centre...is to be of any assistance whatsoever to the administration of justice. Not only must the Centre...do quality work but its credibility and reputation must be restored.

The Criminal Lawyers' Association articulated the greatest level of mistrust. This is what was said:

3. The contamination of evidence is a serious problem. It is however, a problem that could arise at any laboratory. If acknowledged, disclosed and remedied, a contamination problem would not call into question the competence and integrity of a laboratory. However, the failure to acknowledge, disclose and remedy the contamination very seriously calls into question both the competence and the integrity of the lab as a whole. The failure to act is evidence of the lack of any effective system of quality assurance. The fact of contamination was generally known in the biology section of the Centre of Forensic Sciences for at least seven years before any remedial action was taken. That remedial action was taken not as a result of any internal system but as a result of an anonymous letter and outside pressure.

4. Overstatement of evidence is another serious problem. It is the most direct evidence of institutional bias. Again, however, if there has been timely acknowledgment of the problem and effective remedial action it might not call into question the integrity of the lab. That was not the case on the facts in Morin.

5. It might be submitted that the problem of contamination and therefore invalid scientific results

arose only in the case of Mr. Morin and does not signal a greater systemic issue. However, the review of the work of Ms. Nyznyk and Mr. Erickson as part of the external audit [conducted during the Inquiry] revealed that “due to lack of documentation it was impossible to verify in some cases that the conclusions reached in the reports were accurate.” The problem of inadequate documentation identified in the evidence before the Commission was therefore further noted in the review as a cause for concern.

6. Similarly, the review found two further cases where “conclusions may have been stated incompletely, overstated, and/or stated without qualifications which may have led to the evidence being given greater weight than justified by today’s standards.” Aside from these two cases, there was another case by a different scientist in which evidence was admittedly overstated. This case was the subject of comment by Mr. Lucas in his evidence.

7. Nevertheless, the assumption made by the management of the Centre of Forensic Sciences is that there were no serious problems. The news release from the Ministry of the Solicitor General (Exhibit #192) reads as follows:

The findings of the review confirm that during the period of time in question, there were some systemic problems within the Centre of Forensic Sciences’s Biology section. Since then, a number of improvements have been made to ensure the province’s forensic services are in accordance with the highest standards in the world.

.

8. Therefore, the Centre of Forensic Sciences, although able to articulate the theory of quality assurance has not demonstrated an ability to put the theory into practice. Effective management must look for problems, must recognize them when found and must act immediately to remedy such problems. Remedial action in a competent, unbiased laboratory does not depend on outside pressure. Accountability is crucial to any system of quality assurance. The failure

of the Centre of Forensic Sciences to disclose the contamination problem and to take any remedial action at the time makes it impossible for them to “demonstrate competence”. Moreover, concerns as to competence arise on two levels: first, the scientific validity of the analytical results; secondly the overstatement of the conclusions.

9. The evidence of Mr. Lee Baig was that there exists a fundamental mistrust of the Centre by defence counsel. There is certainly a perception of bias. This attitude has historically stemmed in part from the Centre’s policy of not conducting defence testing or offering opinions to the defence without requiring an undertaking to disclose to the Crown. However, the revelations of this Commission have deepened the mistrust and confirmed the suspicion of bias held by many defence counsel. It is submitted that every stage of analysis and interpretation of hair and fibre evidence in the Morin case was flawed. Virtually every flaw operated to the benefit of the prosecution and to the detriment of Guy Paul Morin. The wording of the findings with respect to the two other cases identified by the internal audit indicates that those “overstatements” also benefited the prosecution. It is unlikely that the defence bar would use the Centre more even if there were a policy of confidentiality. Absent significant systemic changes to address the issue of institutional bias, the validity of Centre of Forensic Sciences test results and interpretations must remain suspect. (Citations omitted.)

The Centre of Forensic Sciences plays a vital role in the administration of criminal justice in Ontario. As the largest forensic laboratory in Ontario, it is called upon on a daily basis to assist in the investigation of serious crimes — not infrequently, the most serious crimes committed in this province. It cannot perform this role unless its scientists are objective, independent and accurate both in how they perform their forensic testing and in how they report upon their findings to police officers, prosecutors, defence counsel and the courts. Further, they must be perceived to be objective, independent and accurate by the participants in the criminal justice system.

I am confident that a large number of scientists at the Centre of Forensic Sciences perform their work with distinction. Any blemish upon the

Centre — particularly a blemish of this magnitude — must be viewed by them with horror and frustration. However, I am equally confident that it would be a serious mistake to assume that the failings identified at this Inquiry are confined to two scientists in one criminal case. A number of the failings which I have identified have their root in systemic problems, many of which transcend even the Centre of Forensic Sciences and have been noted in cases worldwide where science has been misused — sometimes resulting in the conviction of the innocent. Further, Mr. Erickson was a section head at the Centre. Ms. Nyznyk was entrusted with many serious cases, including homicide cases. There is every reason to believe that their failings are not unique. Though I found no misconduct on Mr. Crocker's part, he acknowledged his own failings in addressing Roger Cook's evidence, when presented on the fresh evidence application. I earlier found that the Centre's response to a previous case where a hair and fibre analyst overstated his evidence was unimpressive.

Dr. Young candidly advised me that he had not realized the depth of the issues which had arisen at this Inquiry. This caused him, together with the Centre's present Director, Dr. Prime, to visit leading forensic institutions around the world in order to study their policies, procedures, training and quality assurance programs. The Centre has conducted an organizational review, studying its own structure, leadership, client and staff relationships and operations. One result has been that the Centre has embarked upon developing a comprehensive policy manual, updating existing policies and creating new policies where necessary. The Centre also retained independent experts to evaluate, *inter alia*, the findings in the *Morin* case. During the course of this Inquiry I encouraged all parties to implement corrective measures to identified problems rather than await my Report. The Centre of Forensic Sciences has, to its credit, undertaken such measures — some in place, others proposed — to correct these problems. The creation of a separate quality assurance unit represents one example. A number of these measures are endorsed by me in this Report.

It is the position of the Centre of Forensic Sciences that its standards during the *Morin* prosecution accorded with generally accepted standards during that period. Subsequent changes, I was told, have reflected the evolution of standards in forensic sciences as a whole and that, with accreditation in 1993 and with further changes proposed or already initiated as a result of the revelations at this Inquiry, it is unlikely that the failings in the *Morin* case will be repeated again.

I, too, am hopeful that the Centre's corrective measures, together with those which I propose, will substantially reduce the likelihood that these failings will be repeated.

My recommendations draw upon the totality of the evidence heard during Phase II of the Inquiry, the systemic evidence bearing upon forensic issues and the submissions of all counsel. In that regard, I note the emphasis placed upon forensic issues in the excellent submissions on behalf of the Centre of Forensic Sciences, the Morins, AIDWYC, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Canadian Bar Association — Ontario.

(ii) The Centre and the Ministry of the Solicitor General

Before reviewing the systemic evidence and moving on to the recommendations which follow, I wish to address one submission which arises out of any loss of confidence in the independence and impartiality of the Centre.

Several parties before the Inquiry have recommended that the CFS be removed from its place within the Ministry of the Solicitor General and be reconstituted as an independent agency. For example, the Canadian Bar Association — Ontario said this:

The Centre of Forensic Sciences is now part of the Ministry of the Solicitor General and is funded by the Government. At a minimum, it has to be removed from a line Ministry role. To enhance independence, its budget should emanate from a central authority. This independent agency or board may have its own board of directors reporting directly to the legislature or be a non-profit Crown Corporation. Adequate funding is essential to its operation. Funding may be either from government or from a combination of government and private sources. With private sector involvement, scientific discoveries may be patentable and techniques developed for their sale. The CBAO recognizes that there are alternative models for independence. It is beyond the scope of this submission to determine which is the best model. Whatever choice is recommended by the Commission, or recommended for further study, the model should maximize independence, impartiality and accountability.

AIDWYC also urged this position upon me. Its submissions read, in part:

[T]here is a crisis of confidence in the work of the Centre and that the changes that have been undertaken by the Centre cannot ensure the objectivity and impartiality required of its scientists. This is particularly so when those responsible for its operations do not see systemic partiality as a problem. But rather, they believe, as does Dr. Young, that there is and always has been a culture of objectivity at the Centre. AIDWYC concedes that independence will not necessarily guarantee impartiality, however, if accompanied by other measures designed to promote impartiality and high quality scientific work, will go a great distance in helping build an environment where impartiality is an achievable goal.

The Criminal Lawyers' Association said this:

1. It is the position of the Criminal Lawyers' Association that based on the evidence before the Commission, the Centre of Forensic Science has such a deep rooted and fundamental institutional bias that any minor changes in procedure, documentation and training although advisable cannot be seen as addressing the real problems.

The Centre, through its representatives, has failed to acknowledge the real issues raised by the Morin case and has therefore not even begun to address those issues. It is the Criminal Lawyers' Association position that the Centre of Forensic Science as currently structured and managed is not capable of addressing these issues. There is an unacceptable lack of accountability at all levels of the Centre of Forensic Sciences.

The Criminal Lawyers' Association therefore recommends that the Centre of Forensic Science be re-structured as an independent agency or Crown corporation; that it be managed by a board of directors; that it provide forensic services on a fee for service basis to Crown and defence.

.....

The problem broadly identified as “institutional bias” in these submissions is illustrated by the response by the Centre to the problem of “overstating evidence.” As indicated above, this problem was identified in two cases by the recent external audit. It was identified by Mr. Erickson with respect to Ms. Nyznyk’s evidence at the first trial of Mr. Morin. It was identified by Mr. Crocker on the review of the evidence of Roger Cook in the appeal. It was identified by Mr. Lucas in another unrelated case. However, no Centre of Forensic Sciences employee has ever been disciplined for overstating evidence. No accountability exists in relation to this problem and no plans have been expressed to change the Centre of Forensic Sciences approach to this problem.

It is respectfully submitted that the depth of the attitudinal problems at the Centre of Forensic Sciences is so profound and the will to change so noticeably absent that only significant structural change to the entire organization can possibly change the philosophy, attitudes and biases of the Centre. Roger Cook in his evidence outlined the changes to the Forensic Sciences Services in Britain in order to create a “culture of independence”. The agency was semi-privatized. It is now governed by a Board of Governors and performs work for both prosecution and defence on a fee for service basis. Similarly, in Australia steps were taken to separate the lab from all police and prosecution functions. Part of that process involved a fee charging arrangement to make the agency financially independent of police or prosecution budgets. Dr. Tilstone in his evidence properly pointed out that independence does not necessarily import impartiality. He did however acknowledge the value of independence in addressing a deep mistrust on the part of one segment of the administration of justice (ie. the defence bar). He also suggested dialogue as being important to address the problem of actual or perceived bias. Absent any vehicle for dialogue or any reasonable belief that dialogue could address the problem Dr. Tilstone agreed that structural and financial independence might be the only option. It is submitted that no dialogue has even been attempted by the Centre of Forensic Sciences with the defence bar in over two decades. No concrete plans exist to change that situation. Therefore, the only viable option available to

address the institutional bias of the Centre of Forensic Sciences and its lack of accountability to the public is to remove the Centre of Forensic Sciences from the control of the Ministry of the Solicitor-General and to create an independent agency.

RECOMMENDATION

That the Centre of Forensic Science be removed from the control of the Ministry of the Solicitor General. That an independent agency be created to run the Centre. That it be governed by a board of directors. That the Centre be run on a fee for service basis. After the necessary changes are made and set up costs are met, that portion of the Centre of Forensic Sciences budget attributable to police testing should be made available to the police to allow them to pay for scientific testing at the Centre of Forensic Sciences (or at any other laboratory). That portion of the Centre of Forensic Sciences budget attributable to defence testing should be made available to legal aid. All testing and opinions should be rendered to the defence on a wholly confidential basis. (The agency ought not to disclose to the Crown even the fact of a request by the defence).

In its written submissions, the Centre responded to these suggestions as follows:

The Criminal Lawyers' Association, along with various other parties before the Commission, have suggested that the CFS should become a Crown agency, separate from any government ministry, governed by an independent Board of Directors, and operating on a full cost-recovery or fee-for-service basis. The CFS rejects this suggestion, for several reasons.

Perhaps most importantly, the agency suggestion is based on two false premises. First, the CFS rejects the premise that institutional bias, attributable to its place in the Ministry, is currently present in the CFS. There is simply no evidence on the record before this Commission to support such a sweeping assertion. Second, even if there were such institutional bias at the CFS, there is no evidence to support the assertion that it would be remedied by transferring the CFS to Crown agency status.

The possibility of "agency" status was not canvassed with any witnesses before the Inquiry, including Dr. Young, who would have been particularly informed on the pragmatics of that subject. The only discussion of institutional structure was with Drs. Tilstone and Robertson, who spoke about the situation in Australia, which was described as a "political imperative", rather than a particularly logical one. Dr. Tilstone described how, following the Splatt Royal Commission, the forensic service in South Australia was removed from *the police*, in order to "prevent the police department controlling the [forensic] service by controlling the budget". This rationale is not applicable to the case of Ontario, since the police and forensic budgets and administrative structure are already entirely separate, other than the fact that both structures are ultimately responsible to the same Minister. Absent any concern about Ministerial interference (which is not the case here), there is no logical reason to complain about this nominal administrative connection between the two services. Further, and in any event, an agency would still report to the government, through a minister or a committee of Cabinet, and the same tenuous administrative connection would therefore remain.

It is submitted, therefore, that the real complaint in this case is not the institutional relationship between the police and the CFS, but the close working relationship between the two. There is no reason to believe that this would be any different if the CFS were transferred to agency status. Drs. Tilstone and Robertson indicated that the police in Australia continue to be by far the largest consumer of forensic services, and this would no doubt be the case in Ontario as well.

The rationale for a cost-recovery or fee-for-service model is likewise highly questionable. As Dr. Tilstone clearly stated (emphasis added):

[T]he fiscal independence of commercialization is *exceedingly illusory*. In particular, the concept of commercialization and cross-charging fails to address the issue that commercial transactions only work where there's a clear understanding of the buyer, seller and goods triangle, and that this is not the case with forensic science, where the law,

the prosecution service, the defence Bar, and the judiciary are all powerful stakeholders in addition to the police and the laboratory.

Underlying this comment is the recognition that the provision of forensic services is a critical aspect of the criminal justice system, that system being a core business of government. Accordingly, the CFS must be accountable to the public, and such accountability is best achieved when the service resides in government. Under the proposed structure, the funding for forensic services would ultimately still come from the government budget, only it would be funnelled to the consumers rather than to the CFS directly. There is a significant chance that this would result in overall costs being increased, as occurred in England. Further, the police would be in a position of deciding whether to perform certain tests based on cost considerations. In England, the cost of forensics in a single case caused the bankruptcy of a small police department. In an effort to cut costs other police departments in England have set up their own mini-labs to perform more "routine" tasks. Such laboratories are not accredited, and their handling of evidence increases the risk of deleterious change (such as contamination). In addition, there are dangers (1) that relevant tests would not be done because of the costs involved, and (2) that small private sector laboratories would arise, providing competitive prices and causing fragmentation of various "pieces" of the forensic puzzle among a variety of service providers. All of these effects are directly contrary to the philosophy of the Campbell model, which is to enhance co-ordination through a scientific advisor with a detailed knowledge of all relevant forensic science issues.

For these very reasons, the concept of privatization of the CFS has been considered and rejected by the Management Board Secretariat⁴⁶ and by Mr. Justice Campbell in his 1997 Report. Mr. Justice Campbell stated: (Emphasis added.)

⁴⁶ J.S. Ashman and J. Campbell, "Organization of Ontario Government Laboratories," February 1990; D. Balsillie, "Report of the 1993 Review of the Organization of Ontario Government Laboratories," March 1993. The Campbell Report also rejected privatization (at p. 73).

It should be noted however that any significant privatization of law enforcement DNA testing could have a potential negative effect on the use of DNA by law enforcement agencies and by the courts. Considerations against any significant degree of privatization include the potentially higher cost of testing itself; the cost to law enforcement agencies which might result in underuse of DNA testing capacity; privacy issues in relation to sensitive personal genetic material; the difficulties inherent in the potential splitting of a large series of single case samples between different labs; law enforcement confidentiality issues in the highly interactive work between police investigators and forensic scientists, and the difficulties for investigators and Crowns in working with an array of separate labs and scientists with varying degrees of expertise, court experience and credibility. **The same considerations of course apply to the privatization of forensic work other than DNA.**⁴⁷

Where all costs are provided through "sales" to consumers, the focus on quality assurance would likely suffer if revenues fell short. Government funding, while perhaps available to some extent, would be more difficult to obtain where there is no direct link with a Ministry, and where there is a philosophy of complete cost recovery.

Finally, the CFS endorses Dr. Robertson's comments on the fallacy of structural "independence":

But frankly, structural issues are more about perceptions than they are about reality. The reality is that the real quality of the work which is produced is dependant upon the training and the competencies of the individuals. And if you produce someone who views themselves as a professional, you've got a much better chance, underpinned by professional values, you've got a much better

⁴⁷ Campbell Report, at p.73-74, emphasis added.

chance that that person will perform as a professional within whatever organization they happen to be in.

The recommendations to the Commissioner, therefore, are misconceived in viewing agency status as a matter of primary importance. On the contrary, the goals of the parties can best be achieved by directing all efforts toward quality assurance and professional development.

The CFS had earlier submitted:

During the course of this Inquiry it was repeatedly suggested that the relationship between the CFS and the police is detrimental to the objectivity of CFS scientists. The premise is that the objectivity of scientists may be influenced by a close working relationship and by the fact that the two institutions reside in the same Ministry of government.⁴⁸ This is a premise which is rejected generally by forensic scientists, and by the CFS. As stated by Dr. Rodger,

The function of the forensic scientist is to assist with the investigation of crime, which is carried out primarily by police officers. The forensic scientist, therefore, assists the police officers. To state that is in no way to state that the integrity of the forensic scientist is suspect.⁴⁹

It is submitted therefore that the institutional structure of the CFS needs no alteration. Rather, the issue is whether the CFS has taken all possible measures to foster objectivity and to identify a lack of objectivity if it occurs.

I agree with the CFS that it is unfortunate that this proposal was not specifically put by its advocates to Dr. Young when he testified before me.

⁴⁸ Note that unlike many forensic institutions, in Australia, Scotland and the United States for example, the CFS is not a laboratory which is part of a policing agency. Its position within government is separate from both the Crown and the police.

⁴⁹ W.J. Rodger, "Does Forensic Science Have A Future?," *Journal of Forensic Science*, November/December 1984.

Accordingly, I do not have the benefit of his views in formulating my recommendations. That is why I have quoted the Centre's written submissions at some length.

The submissions advanced by the Criminal Lawyers' Association, AIDWYC and the Canadian Bar Association — Ontario represent the understandable concerns of some of the most important stakeholders in the justice system and they deserve careful consideration. However, having said that, I do not recommend, at present, that the CFS be removed from its place within the Ministry of the Solicitor General and be reconstituted as an independent agency. Though the Centre is accountable to the Ministry, the only evidence before me is that it is autonomous in terms of its day-to-day operations. The failings which I have identified in this case are unrelated to Ministry interference in the Centre's work. I am not persuaded that the failings would not have occurred had the Centre been an independent agency or a privatized corporation. To be blunt, the Centre has itself to blame. The Centre does not suggest otherwise.

I share most of the concerns expressed on behalf of the CFS. Whether it is an independent agency, a privatized entity or retains its present status, the vast majority of its work will be done at the request of the police. The Centre provides the forensic services relating to most of the criminal investigations in this province. Any defence need for forensic services is, in most instances, reactive to a criminal prosecution, and is generally confined to a relatively small percentage of the total number of criminal cases. Indeed, it is this ongoing and heavily weighted relationship between the police and the CFS (which would exist whatever the Centre's status) that raises concerns about partiality.

Since I am not convinced that removal of the Centre from its placement within the Ministry would have an appreciable effect on its impartiality, the real issue is the *appearance* of impartiality. Dr. Tilstone framed the issue well: independence does not guarantee impartiality; but it can assist in removing an entrenched and deeply rooted perception of bias or level of distrust which exists.

I am not yet persuaded that the changes already undertaken by the Centre, together with the implementation of the recommendations in this Report, will be unsuccessful in restoring the appearance of impartiality which has been so badly eroded. These changes are substantial; they involve greatly

increased training, education, supervision, external and internal monitoring, the statutory creation of an advisory board and specific recommendations as to the manner in which examinations are conducted, and findings are reported to the police, prosecutors, the defence and to the Court. If the changes which follow this Report do not adequately address the depth of the Centre's failings (and the public's perception respecting them), the status of the Centre may have to be revisited.

(iii) Background Materials

In formulating my recommendations, I was assisted by a considerable body of forensic-related material collected by my staff (and made available to all counsel) or provided by various counsel for parties at the Inquiry. Several Royal Commissions or Inquiries, particularly in England and Australia, have addressed the misuse of science in criminal prosecutions. Many of their Reports have been provided to me. I wish to express my gratitude, in particular, to Assistant Commissioner Hadgkiss and Dr. Robertson, both of the Australian Federal Police, who enthusiastically provided us with resource materials from Australia, not easily accessible to us. Indeed, I was impressed with the encouragement offered to our Inquiry by all of the systemic witnesses, who attended voluntarily to assist us in our work.

(iv) United Kingdom

*R. v. Ward*⁵⁰

In 1973 and 1974, a series of bombs were set off in various parts of England, causing the death of 12 persons and injuries to many others. Judith Ward was accused, and ultimately convicted, of committing the crimes. She was sentenced to life imprisonment.

Ms. Ward did not appeal her conviction, but on September 17, 1991, the government referred her case to the Court of Appeal, Criminal Division. The appeal court quashed the convictions, finding that they were all unsafe.

The case against Ms. Ward was based largely (though not exclusively)

⁵⁰ *R. v. Ward*, [1993] 1 W.L.R. 619 (C.A.).

on confessions and admissions made by her, and on scientific evidence to the effect that after two of the bombings, traces of nitroglycerine were found on her person, and that after the third bombing traces of nitroglycerine were found on various articles belonging to her and in a caravan in which she had been staying. The appeal court found that the confessions and admissions were unreliable. It also found, partly on the basis of fresh evidence, that the forensic scientists involved in the case had suppressed significant relevant information, overstated the forensic findings, and were biased in favour of the prosecution.

The Court of Appeal outlined numerous errors committed by the forensic scientists in the case. They are briefly referred to below and need not be detailed here. Of greater relevance are the Court's comments on the perceived neutrality of forensic scientists and the responsibilities which they bear.

Glidewell L.J. wrote:

In the appellant's case the disclosure of scientific evidence was woefully deficient. Three senior R.A.R.D.E. [Royal Armaments Research and Development Establishment] scientists took the law into their own hands, and concealed from the prosecution, the defence and the court matters which might have changed the course of the trial. The catalogue of lamentable omissions included failures to reveal actual test results, the failure to reveal discrepant Rf values, the suppression of the boot polish experimental data, the misrepresentation of the first firing cell test results, the concealment of subsequent positive firing cell test results, economical witness statements calculated to obstruct inquiry by the defence, and, most important of all, oral evidence at the trial in the course of which senior R.A.R.D.E. scientists knowingly placed a false and distorted scientific picture before the jury. It is in our judgment also a necessary inference that the three senior R.A.R.D.E. forensic scientists acted in concert in withholding material evidence. Common sense suggests that none of them would have wanted a sudden revelation of the suppressed material at the trial. It is pointless to try to add up the number of failures which amount to material irregularities. It is sufficient to say that cumulatively the failures amount to a material irregularity which, on

its own, would undoubtedly have required us to quash the appellant's conviction. The application of the proviso would have been out of the question. On the scientific case deployed against her the appellant did not have a fair trial. Our law does not tolerate a conviction to be secured by ambush.

For the future it is important to consider why the scientists acted as they did. For lawyers, jurors and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process. Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity. That is what must have happened in this case.

.....

What are the lessons to be learnt from this miscarriage of justice? The law is of necessity concerned with practical affairs, and it cannot effectively guard against all the failings of those who play a part in the criminal justice system. But that sombre realism does not relieve us, as judges, from persevering in the task to ensure that the law, practice and methods of trial should be developed so as to reduce the risk of conviction of the innocent to an absolute minimum. At the same time we are very much alive to the fact that, although the avoidance of the conviction of the innocent must unquestionably be the primary consideration, the public interest would not be served by a multiplicity of rules which merely impede effective law enforcement. Recognising that the Royal Commission on Criminal Justice will no doubt consider the subject of scientific evidence in criminal trials in depth, we propose to limit our observations about the lessons to be learnt to two matters which we regard as of critical importance.

First, we have identified the cause of the injustice

done to the appellant on the scientific side of the case as stemming from the fact that the three senior forensic scientists at R.A.R.D.E. regarded their task as being to help the police. They became partisan. It is the clear duty of government forensic scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice. That duty should be spelt out to all engaged or to be engaged in forensic services in the clearest terms. We trust that this judgment has assisted a little in that exercise.

Secondly, we believe that the surest way of preventing the misuse of scientific evidence is by ensuring there is a proper understanding of the nature and scope of the prosecution's duty of disclosure.

Roger Cook noted that this case caused 'tidal waves' in the forensic community.

The May Reports

On October 19, 1989, The Right Honourable Sir John May was appointed by the Home Secretary and Attorney General of the United Kingdom to conduct a judicial inquiry into the convictions of 11 different persons who were to become known as the Guildford Four and the McGuire Seven. All of their convictions were ultimately quashed by the Court of Appeal, Criminal Division.

The charges against the Guildford Four arose out of a series of I.R.A. bombings which occurred in England in 1974 and 1975. The Guildford Four were convicted of causing explosions at two bars in Guildford on October 5, 1974. Two of the Four were later convicted of causing a third explosion at a bar in Woolwich on November 7, 1974. Seven people died in the explosions. The bars were known to be popular with members of the English armed forces.

The Guildford and Woolwich bombings were only three of a series of I.R.A. bombings. During the course of the police investigation into the other bombings, the McGuire Seven were arrested on charges of possessing explosives. The suspicion, of course, was that the Seven were involved in making the explosive devices used in the I.R.A. bombings.

Issues of scientific evidence arose in each case, although in very different ways. Sir John May investigated and reported on these issues. His findings, and the background circumstances which led to them, are summarized below.

The Guildford Four

The Guildford Four were largely convicted on the basis of confessions and admissions made by them. Scientific evidence played no part in the trials. Scientific evidence relevant to the trials did exist, however.

As indicated above, the Guildford and Woolwich bombings were part of a series of I.R.A. bombings. As part of the investigation into those bombings, scientists at the Royal Armament Research and Development Establishment ("RARDE") examined the bombs to determine whether forensic links existed between them (something known as 'correlation work'). Their findings indicated (cumulatively) that the Guildford and Woolwich bombs were linked to a number of the bombs used in other incidents. The importance of this finding was outlined by Sir John May:

The importance of the correlation work to those who have campaigned on the Guildford Four's behalf is that they would interpret the work as meaning that all the bombings referred to were carried out by the same people. Hence since the bombings continued after the Guildford Four's arrest, the correlation work on this interpretation must indicate the Guildford Four's innocence.

The scientist's findings were reported in two statements, dated January 24, 1975 and October 10, 1975. The Guildford Four trial commenced in September, 1975, and thus one statement was prepared well before the start of the trial; the other was prepared during the course of the trial. Neither was disclosed to the defence until well after the trial (and subsequent appeal).

Sir John May found that it was understandable that Crown counsel lost sight of the possible significance of the January 24th statement, and therefore did not disclose it, since the Crown's interest in the work was in whether it linked the Guildford Four to the other bombings (which it did not). However, he also made the following findings:

On 24th January 1975 Mr. Douglas Higgs of RARDE made a witness statement linking the Woolwich bombing with other throw bomb incidents. That statement was not disclosed by the prosecution prior to the trial of the Guildford Four. It should have been. It was overlooked by all concerned. Counsel had it in their possession at the very beginning of their involvement in the case but by the time questions of disclosure were being considered by them they had lost sight of its potential significance. The staff of the [Director of Public Prosecution's] office should also have appreciated its continuing significance and sought Counsel's advice on disclosure. On 10th October 1975 Mr. Higgs made a statement linking the Guildford bombing with Woolwich and with many other bombings. This statement post dated the commencement of the trial and was not seen by Counsel until 1977. I have been unable to establish whether it was provided to the DPP before the trial ended. Had it been, it should have been disclosed. In any event, I have no doubt that these statements and the latter amended versions of them...should have been disclosed prior to the 1977 appeal irrespective of what had happened in the context of the trial.

The McGuire Seven

Unlike the Guildford Four trial, scientific evidence played a critical role in the trial of the McGuire Seven. In fact, the prosecution's evidence was almost entirely scientific. In a Report dated July 12, 1990, Sir John May found that the scientific evidence was unsound and the scientists involved in the case failed to disclose relevant information to either the prosecution or defence.

As indicated above, the McGuire Seven were accused and convicted of possessing explosives, nitroglycerine in particular. The police thoroughly searched the McGuires' home but found no evidence of any bulk quantity of nitroglycerine. The prosecution's case depended on scientific evidence of traces of nitroglycerine on the hands and gloves of the accused.

Seven thin layer chromatography tests were conducted on swabs of the accused's hands and scrapings from underneath their fingernails. Positive results were obtained for all accused except one (Annie McGuire), although a majority of the results were negative for three of them. With respect to

Annie McGuire, a positive test result was obtained on her gloves.

The scientists at trial testified that the testing proved conclusively that the Seven had been handling nitroglycerine (as opposed to any other substance). One scientist further testified that finding nitroglycerine underneath the fingernails demonstrated that nitroglycerine had been handled or kneaded, rather than just touched. The defence countered that the TLC test used in the case was not specific for nitroglycerine, and could not prove its presence. It also contended that the evidence could not exclude the possibility of contamination, *i.e.* the presence of nitroglycerine other than by the known handling of it.

The defence at trial called an expert witness, Mr. Yallop, to substantiate their claims. In particular, he testified that substances other than nitroglycerine could mimic it and fool the TLC test. Sir John May found, however, that Yallop was effectively and successfully discredited in cross-examination.

Just before the trial judge's charge to the jury, Mr. Yallop found a memo from one of the principal scientific witnesses for the Crown (Mr. Elliot) which stated in effect that the TLC test could not easily discriminate between nitroglycerine and another explosive substance, pentaerythritol tetranitrate (PETN). The memo was forwarded to the prosecution, but the RARDE scientists, particularly Mr. Higgs, assured the Crown that confusion between PETN and nitroglycerine was quite unlikely. The memo was ultimately filed on consent at trial, with the proviso that neither the defence nor the prosecution suggested that PETN was present on the accused's hands or gloves.

Sir John May found that the defence made this admission based on a fundamental mistake of fact. Notebooks and case files of the scientists involved in the case revealed that they knew throughout the trial that PETN was potentially confusable with nitroglycerine based on the TLC test used. These notes had not been disclosed prior to trial. Mr. Higgs testified at the trial that he had "a high level of confidence" that no other substance would be confused for nitroglycerine. He failed to mention PETN. He stated that such confusion was only a "vague possibility." Sir John May found that "[t]he failure to mention PETN at the trial was ... wholly misleading." He later added:

14.5 Secondly, to establish all the elements of the prosecution case the Crown relied on the evidence of the RARDE scientists. Their accuracy, reliability, fairness and credibility were fundamental to the convictions. The credibility of Mr. Yallop as a witness for the defendants was severely damaged in cross-examination, on the grounds that he had been selective in his evidence and had taken extraneous “non-scientific” factors into account in forming his conclusions. It is now clear to me that some at least of the RARDE scientists, notably Mr. Elliott who was the principal case officer concerned, did the same. If the jury had been aware of some of the contents of the notebooks which I have seen, particularly relating to the scientists’ knowledge of but failure to disclose the existence of PETN and its mimicry of NG in the TLC/toluene tests, the fact of second tests themselves and the experiments carried out during the trial, I believe that they would have viewed the evidence of the RARDE scientists very differently. In his submissions to me Mr. O’Connor, acting on behalf of Mrs Conlon as the personal representative of Giuseppe Conlon, quoted passages from Sir Michael Havers’ cross-examination of Mr. Yallop:

An expert witness such as yourself has the obligation to be frank with the court ... not to be selective about his experiments ... not to pick the best and discard the worst ... not to select the ones that suit the case you were supporting and discard the one that casts doubt upon it ... You have not followed good scientific practice by disclosing all the tests; you have just been selective and picked out the one you wanted.

Had any of the counsel acting for the defendants at the trial had the material which I now have, he could have cross-examined the RARDE scientists effectively on precisely the same lines as did Sir Michael Havers challenge Mr. Yallop. In my opinion it has been shown that the whole scientific basis upon which the prosecution was founded was in truth so vitiated that on this basis alone the Court of Appeal should be invited to set aside the convictions.

After trial, it was also discovered that *a number* of other pieces of

evidence had not been disclosed to the defence. For example, second tests of the hand and glove swabs had been conducted using a different type of TLC test. These second tests were negative. Sir John May found that these tests should have been disclosed.

Scientific studies were conducted for the purposes of the May Inquiry to determine the likelihood of contamination, as theorized by the defence at trial. These studies demonstrated that there was a substantially greater scope for innocent contamination of hands and gloves than the evidence of the Crown witnesses at trial suggested. In addition, an independent study was conducted after the trial by, among others, one of the RARDE witnesses at trial (Mr. Higgs), which showed that nitroglycerine can migrate under fingernails without the explosive being kneaded. In the absence of any evidence of a bulk quantity of nitroglycerine in the McGuire's house or nearby, the prosecution at trial had relied heavily upon the evidence that finding nitroglycerine underneath the fingernails demonstrated that nitroglycerine had been handled or kneaded. Mr. Higgs conceded before the May Inquiry that that conclusion could not safely be drawn.

All of this information was obviously not available to the witnesses at the time of trial, but Sir John May found that the RARDE scientists had actually conducted their own experiments relevant to the issue of contamination, the results of which had been only partially disclosed:

11.20 Another serious omission revealed by the RARDE notebooks was that *during* the Maguire trial certain experiments were carried out at RARDE but the results were only partially disclosed. There were three sets of experiments.

i) Fingerprint ink

It appears from notes taken at the trial that Vincent Maguire in his evidence on 12th February 1976 said he had been fingerprinted before he was swabbed. The jury passed a note to the judge asking whether there would be any adverse effect on the swabs if fingerprints were taken before swabs. This was very properly picked up by the prosecution who clearly asked RARDE to do an experiment to enable the jury's question to be answered.

This was done by a Mrs Brooker, then a Scientific

Officer at RARDE, who was called to give evidence on 19th February 1976. She said that she had carried out on 13th February TLC tests with fingerprint ink and NG [nitroglycerine] to establish whether the former could interfere with the performance of NG in the TLC test. She told the court that mixing fingerprint ink with NG produced a lower Rf value [*ie* affected the results].

ii) Fingernail scraping tests

According to Mr Gray's (junior counsel for Annie Maguire) notes of the trial, Annie Maguire gave evidence of in-patient treatment for her skin problem. Her hands had been very itchy and she kept scratching (although there was no current problem). This evidence was given on 8th February 1976. The next day Mr Yallop gave evidence on the possibility of migration by NG under the fingernails after no more than touching a contaminated object. Mr Higgs had already said in evidence on 27th January 1976 that he could not see how NG could be transferred under the fingernails after merely clenching the hand. Mr Elliot had maintained the assertion contained in his statement that NG under the fingernails indicated manipulating and kneading.

It was not until the RARDE notebooks were shown to the Inquiry that it was known that hand trials had also been conducted by Mrs Brooker on 11th February 1976 to investigate the presence of NG on the hands and under the nails after the fingertips and nails of one hand had been scratched on the other. The procedure was carried out on a person with long nails (Dr Carver, who has no current recollection of the experiment) and a person with short nails. The results indicated a faint trace of NG under Dr Carver's nails but nothing under the short fingernails.

Mr Higgs told the Inquiry that he was unaware at the time that the test had been carried out.

iii) "Sustac" heart tablets

On Wednesday 21st January Mr. Elliott gave evidence to the effect that when heart tablets containing NG were crushed on the hand a positive result for NG was obtained. But if the hands were left for a period of time no NG was detected.

Three weeks after this evidence was given there is a note in Mrs Brooker's notebook of a test carried out on the 12th February involving crushing one tablet in the left hand and three tablets in the right hand. Each hand was swabbed 3 ½ hours later and produced a positive result for NG. This result clearly conflicted with the evidence given earlier in the trial by Mr Elliott. As far as we can ascertain the results of the test were not made known.

Again Mr Higgs has no recollection of either how the tests came to be done or why the results were not disclosed. He did not learn the results of the test because he says he was not, during the trial, in contact with his staff at RARDE.

11.21 Both the question of contamination by heart tablets and the possibility that NG could be transferred under the fingernails after scratching were raised at the trial and were both important. As I would have expected, prosecution counsel told me that had they been made aware of the tests they would have ensured that the results were made available to the defence. It seems to me clear that the results were not communicated by RARDE to the prosecution despite the fact that the experiments were carried out on three consecutive days a week before the person who conducted them gave evidence. While I accept that it was not Mrs Brooker's responsibility to convey the results of her tests, it is to say the least strange that no one at RARDE saw fit to tell at least the office of the Director Public Prosecutions of the two further tests Mrs Brooker had done. She can only have been asked to do them by a senior scientist at RARDE and one who knew what questions were being raised at trial. As Mr Elliott has died since the trial and thus I heard no evidence from him, I am not able to identify who this senior scientist was. Whoever he may have been, however, it should have been apparent to him that prosecuting counsel ought to have been told of all three further tests.

Sir John May ultimately concluded that innocent contamination was a possible explanation for the findings which could not be safely excluded.

Sir John May held further hearings with respect to the McGuire Seven

after the release of his first Report. Further scientific studies were also commissioned with respect to the issue of contamination. Based upon these studies, Sir John May concluded in a second Report (dated December 3, 1992) that the positive test results from the swab samples obtained from the accused could have resulted from accidental contamination of the samples after they were obtained; that finding nitroglycerine underneath the fingernails did not *prove* that the explosive had been handled; and that the fingernail findings could have resulted from cross-contamination during the taking of the McGuire samples (without any fault on the sampler's part).

The Runciman Report

On March 14, 1991, the Royal Commission on Criminal Justice, chaired by Viscount Runciman, was established by the Government of the United Kingdom. On the same day, the Court of Appeal had quashed the convictions of the six men convicted of the 1974 bombings of public houses in Birmingham (the 'Birmingham Six'). The government announced that the Birmingham Six case, along with many others (including the Guildford Four and the McGuire Seven), had raised issues of general concern. The Commission was accordingly appointed, not to inquire into particular cases, but rather to review the criminal justice process in England and Wales as a whole.

One of the issues that the Royal Commission was directed to examine was "the role of experts in criminal proceedings, their responsibilities to the court, prosecution, and defence, and the relationship between the forensic science services and the police." In doing so, the Commission made a number of recommendations designed to improve the delivery of competent independent forensic services. The relevant portions of these recommendations are referred to in the context of specific recommendations which I have made below.

(v) Australia

In an article entitled "Misapplied Science: Unreliability in Scientific Test Evidence,"⁵¹ author Judy Bourke addresses the issue of unreliable scientific evidence in Australia. She examines the findings of several

⁵¹ Parts I and II, (1993) 10 Aust. Bar Rev. 123.

Commissions of Inquiry into wrongful convictions in the context of her thesis that scientific evidence is frequently misused in criminal trials because it is often unreliable, yet shielded from scrutiny by an ever present aura of scientific certainty. An excerpt from her article is reproduced below. The excerpt is rather lengthy, but necessary in order to understand the circumstances of the wrongful convictions under examination. Reference should be had to the original Inquiry Reports for a complete outline of the findings of the Commissions and the facts of the cases.

“My God, My God. The dingo’s got my baby.”

Mrs. Chamberlain, 17 August 1980

[The scientist] says it is foetal blood, and I suggest to you that she ought to know ... because you know really, if the suggestions made about their work in this court have any substance, people in New South Wales are in constant danger of being wrongly convicted when ever there’s some blood involved, and it’s really, I suggest, rather too ridiculous to contemplate that [the scientist] would come into this, in the course of her daily work, as a professional forensic biologist, and muck it all up not knowing whether she was dealing with adult blood or the blood of a child under three months of age.

Prosecutor at the Chamberlain trial, October, 1982

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Mrs. Chamberlain’s spontaneous tragic utterance was not accepted at her trial for the murder of her nine week old daughter. Scientific evidence from various fields was found to prove a circumstantial case of homicide. The judicial appeal process by the Chamberlains effectively affirmed faith in the reliability of the scientific evidence which had been relied upon. Mrs. Chamberlain spent three and a half years in jail before the *1987 Commission of Inquiry into Chamberlain Convictions (the Morling Report)* cast serious doubts on the reliability of the scientific evidence.

There are two views of the Chamberlain case.

Many scientists and many lawyers believe the *Chamberlain* case is an aberration within the Australian legal system. This marginalisation is in no small part due to the media sensationalism which has always surrounded the *Chamberlain* case.

The other view, that of a small minority of scientists and an even smaller number of lawyers, believes the *Chamberlain* case is merely indicative of a more extensive problem. That is, the unreliability of scientific evidence unjustly affects many criminal trials where such evidence is used to prove crucial circumstantial facts. They see the problem compounded by a legal community which, along with the general population, unquestionably accept scientific test results and opinions based on such results. And the frequent misuse of scientific test evidence, in the words of the highly respected Mr. Winneke QC, has reached "urgent proportions".

This paper supports the second view. I will argue that scientific test evidence is frequently misused in criminal trials because of its unreliability. The heart of the problem lies in the fact that those charged with presenting and trying the facts of a trial, whether judge, jury, counsel or solicitor, are unable to assess the accuracy of the test results. This is attributable to the aura of scientific certainty which creates a shield of accurate objectivity around scientific test evidence. The legal process, in admitting and utilizing scientific tests evidence, is neither directly concerned with its accuracy nor the implied assumption of certainty it carries. Scientific evidence cannot be relevant unless it is accurate, no matter how much it purports to be concerned with the issue before the court. And scientific test evidence, regardless of its accuracy, is not critically assessed within the system to avoid over-emphasis or over-reliance being placed on it as a piece of merely circumstantial evidence.

This paper will argue that there is a separate problem of *reliability* of scientific test evidence. Such evidence cannot be considered solely in terms of admissibility; it differs to other forms of identification evidence which may be considered unreliable, such as eye-witness evidence. The subject matter, the concepts, and the language, preclude an assumption that ordinary

laypersons have the experience to evaluate the reliability of scientific test evidence, either as to its accuracy, or to compensate for their inherent bias. With the growth in science and technology now occurring, the need to find effective solutions to this problem is immediate.

The first part presents a series of Australian case studies as the basis of the three aspects of the problem: the existence of unreliable scientific test evidence; its extent across a range of scientific tests, whether old established techniques or novel ones; and the lack of awareness of the problem by lawyers. Anecdotal evidence from interviews with members of the legal and scientific communities supplements the facts detailed. The second part briefly examines the law as it currently applies to scientific evidence, placing the unreliability problem in context. This provides the basis for the third part which synthesises the material presented, and outlines solutions to effectively address the problem of unreliable scientific test evidence.

Within this framework, the approach taken in this paper is necessarily broad: it does not present a critique of the unreliability of a particular case, test or field of science. It does not take issue with the presentation of scientific test evidence within the adversary system. Furthermore, the findings do not purport to be of statistical value. Rather, it is a preliminary study, clearly demonstrating the existence of a problem confronting the legal system which is conceivably of significant magnitude. It is worth noting that the problem is not confined to Australia — the *Birmingham Six* case in England, the *Thomas* case in New Zealand, and the *Castro* case in the United States of America all attest to the larger problem facing the adversarial system at the end of the twentieth century. However, for the purposes of this paper, case studies and interviews were confined to the Australian criminal legal system.

I — The Evidence

Introductory Comments

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Scientific Dimensions

There are two dimensions to the use of scientific test evidence which jointly contribute to the unreliability problem. First, scientific tests may be unreliable because they are scientifically *inaccurate*. Secondly, scientific tests, irrespective of the accuracy, may be unreliable because an *aura* of science surrounds the scientific evidence in illusory certainty.

The first dimension, scientific inaccuracy, is a real and significant aspect of the problem. While errors do not occur with every test, its potential should not be overlooked as minimal. There are three levels of scientific testing which must concern the lawyer when considering the accuracy of scientific test evidence. The first is the reliability of the underlying scientific principles, secondly, the reliability of the scientific process and its execution, and thirdly, the reliability of the interpretation.

Lawyers must refrain from concluding, when ignorant of scientific philosophy, principles, and processes, that scientific malpractice is the cause of any problem. Inaccuracy may result from procedural flaws and less than ideal sample quality. Inaccuracy may be caused by poor application of scientific principles, using preliminary tests to express firm conclusions. Inaccuracy may also result from procedural flaws, which are in no part due to poor sample quality.

The second dimension, the aura of scientific certainty, causes lawyers and jurors to operate under a shroud of assumed omnipotence of science. This precludes both a critical assessment of the accuracy of test results, and also precludes a critical weighting of the scientific evidence amongst the totality of the evidence, regardless of its accuracy. Twentieth century dependence on science and technology, without an understanding for basic scientific principles, has created an aura of scientific certainty which pervades the whole of society, and no less lawyers.

The aura of scientific certainty has an overall impact which cannot be defined further. However, two specific examples emerge from the case studies, both concerned with the interpretation of test results. One is

that observed facts are expressed as 'consistent with' the hypothesis the accused is guilty; the other is the statistical presentation of observed facts.

Legal Dimensions

The two legal dimensions of the problem of unreliable scientific test evidence are, first, that lawyers are generally unaware of the *existence* of a problem, and secondly, the *extent* of the problem encompasses all scientific tests.

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The Chamberlain case

On 29 October 1982 Mrs. Chamberlain was convicted in the Supreme Court of the Northern Territory of the murder of her nine week old daughter, and sentenced to life imprisonment. She was released from prison nearly three and a half years later...On the basis of further evidence before the [Morling] Inquiry which was not presented at the trial, the *Morling Report* concluded 'that there are serious doubts and questions as to the Chamberlains' guilt and as to the evidence in the trial leading to their convictions'.

This case study only examines the blood tests in the *Chamberlain* case. Although other scientific evidence was also found to be unreliable by the *Morling Report*, the conclusions as to the blood tests were significant to the final recommendation. The blood tests of stains in the Chamberlains' car, and articles found in it, were crucial to the prosecution's case, because this was asserted to be the scene of the murder. The blood tests indicated not only the presence of blood, but also that it was foetal blood as distinct from adult blood. The ortho-tolidine test supposedly proved the presence of blood, and the cross-over electrophoresis technique that it was foetal blood.

The ortho-tolidine test

The ortho-tolidine test is a preliminary, or screening, test to detect the presence or absence of blood. It is a preliminary test because it can give a positive reaction to substances other than blood and is therefore not

totally specific to blood. It is a simply executed test used as an aid to forensic scientists to suggest if further blood tests should be carried out. The results of an ortho-tolidine test should not be used to give conclusive opinions that blood exists in a certain sample.

Deficiencies to the ortho-tolidine test include its lack of specificity and its acute sensitivity to blood. The non-specificity of the test was demonstrated at the Morling Inquiry: Mount Isa dust reacts positively to the ortho-tolidine test because of the presence of copper compounds in the air at Mount Isa. The Chamberlains lived at Mount Isa before and after the death of their daughter. Its acute sensitivity to blood was also shown: it will react to such small amounts of blood as may be scattered by a normal sneeze. As the intensity of the reaction does not depend on the volume of blood it is not safe to estimate a volume unless it can be seen. The *Morling Report* concluded:

the ortho-tolidine results obtained from [the samples taken from the car] did not establish the presence of blood. Even if the reactions observed were the product of blood, it could have been such a small amount that its presence there would not justify the drawing of any inference adverse to the Chamberlains.

The cross-over electrophoresis test

Some of the 'blood' samples taken from the car were subjected to further testing to identify them as foetal blood, on the assumption that it was blood. The cross-over electrophoresis technique was used and at the trial said to confirm the presence of foetal blood. The *Morling Report* doubted the reliance placed on the cross-over electrophoresis results on three grounds. First, the tests lacks specificity to foetal blood; secondly, there was an inherent problem with the samples taken from the car; and, thirdly, the procedure itself gave cause for concern.

First, the cross-over electrophoresis test lacked specificity to foetal blood. However, another test, the Ouchterlony test, is specific, and can confirm the presence of foetal blood. The Ouchterlony test was not

used in the *Chamberlain* case.

Secondly, the results of the cross-over electrophoresis tests were unreliable because of the denaturing effect of heat and time on exposed blood. The samples tested were not taken from the Chamberlains' car until at least 13 months after Azaria's disappearance. During that time, the Chamberlains had use of their car in Mount Isa where the interior of the car could feasibly have reached 80c on several days. The *Morling Report* summed it up as:

the age of any blood in the car and the temperatures to which it had been exposed ... raises doubts as to the reliability of [the] immuno-chemical results and, in particular, those depending upon the use of the anti-foetal haemoglobin anti-serum.

Thirdly, the procedure used for the cross-over electrophoresis testing can be faulted in several ways. With respect to the so-called 'arterial spray' the *Morling Report* said:

The fact that she could come to such a conclusion about something which was, very probably, sound deadener casts doubt upon the accuracy of her other results.

The first procedural fault was to use the anti-sera reagent 'straight off the shelf' as if it were designed for routine laboratory use. At the Inquiry the scientist agreed that this created flaws, and agreed that 'on this basis, approximately one-third of those results would have been worthless'. Secondly, the use of 'controls' in the test procedure varied greatly. Tests run on known substances and of known dilutions are controls. As the *Morling Report* states 'the known blood of Azaria found on her clothing would have been a much more satisfactory control and would have afforded more confidence in the results.'

A third procedural flaw was the estimation of the dilution of the 'blood' samples by visually comparing the red colour with the known dilution of a control. Scientists at the Inquiry disputed the original method used, although they could not agree if the samples were

significantly over-diluted or significantly over-concentrated. Either way it affected the accuracy of the results obtained, and was avoidable. The fourth procedural fault was that only the scientists' notebook was kept as a record of results — the test plates were thrown out, and no photographs were taken of them. The interpretation of these tests is relatively subjective which casts doubt on the results when no visible evidence of the tests was retained.

The Splatt case

On 3 December 1977 an elderly woman was brutally strangled in her Adelaide home. There were no witnesses. Within a year Mr Splatt was convicted of her murder. Splatt was released from prison after the 1984 *Royal Commission Report concerning the conviction of Edward Charles Splatt (the Shannon Report)* found reasonable doubt as to the validity of the scientific evidence.

The prosecution's case relied on the cumulative effect of similarities of trace materials between the crime scene and the home and working environment of Splatt. Scientific tests were conducted to detect the presence and relative proportions of trace materials such as seed particles, paint particles, human hair, cotton fibres and wool fibres. The first two of these typify the reliability problems in the evidence which the *Shannon Report* revealed.

Seed Particles

Splatt was linked to the crime scene by the presence of seed fragments on the victim's bed, the accused's clothing and the accused's car. There was an aviary in Splatt's backyard. First, all the fragments were 'confirmed' as seeds by their positive reaction to Iodine and Sudan IV, which respectfully identify starch and oil. Secondly, scientists stated at the trial that the seed fragments on the bed were (a) of the type found in a bird seed mix purchased by the botanist, and (b) contained most of the same seed types as found in the aviary. Both observations implicated Splatt at the trial as the carrier of the seed particles to the crime scene. Thirdly, the seed fragments on the bed were allegedly uncooked, and therefore not from biscuits, bread or

toasted muesli, because the starch grains had not lost their bipolarised character, a scientifically determinable feature.

The *Shannon Report* found the reliability of such scientific tests dubious in three ways. First, the Iodine and Sudan IV tests are preliminary: they do not identify samples beyond being starchy or oily. These tests cannot confirm that particles originate from botanical seed. Therefore, it is assumed, not proved, that the particles were botanical. Secondly, the comparisons between the type of seed grains at the crime scene and those in connection with Splatt were a search for similarities. They merely confirmed the hypothesis that Splatt was guilty; they did nothing to try to exclude him. Thirdly, bipolarisation in starch grains does not confirm prior heating: starch grains do not necessarily lose their bipolarisation on the application of heat, and there are other means by which starch grains can lose their bipolarisation. Thus the grains may have been cooked and thus not been bird seed.

Paint particles

The presence and ratio of metal-to-paint fragments, and the ratio of orange-to-any-other colour in the paint particles was probably the most important scientific evidence linking Splatt to the crime scene. Samples were compared from the crime scene with samples from Splatt's clothes, car and workplace. Splatt worked as the spray painter in a factory across the road from the victim's house.

The trace materials were collected by tape liftings, sweepings and vacuuming. Microscopic examination indicated metal-to-paint fragments existed in a 25:75 ratio in samples from the crime scene, and the clothes, car and work environment of Splatt. Scientific analysis by solvents and electron microprobe produced results that orange paint was present in these samples in ratios of close to 90:10 with respect to any other colour. This analysis also showed that the various colours of paint particles from the crime scene matched the colours of paint particles from Splatt's workplace. Electron microprobe analysis of the metal particles produced a table of results from which it was concluded that the material from the crime scene was consistent with that

from Splatt's workplace.

Vaseline coated slides were left at the crime scene for an extended period of time to test the extent of wind blown particles that arrived there. The particles found on the slides were smaller than those found at the crime scene. The trial evidence was that the paint and metal particles at the crime scene were too big to have been blown from the factory.

A neighbouring factory which used the same brand of paint did not have 90% orange paint particles on the floor. Splatt's co-employees were not suspects because all but one had the inverse metal-to-paint ratio of 75:25. The exception was Splatt's son who lived at home and whose clothes were washed with Splatt's. The son's ratio was 50:50. The Locard principle of transfer was explained at the trial as the transference of trace materials from one object to another on contact. It accounted for the transference of trace materials to the crime scene, supposedly from Splatt, and for the difference in the ratio of the son's clothing, supposedly 75:25. It was described as 'one of the basic principles of modern forensic science'.

The *Shannon Report* found each aspect of this evidence to be unreliable. The vaseline coated slides incorrectly excluded 'windblown' as a source of paint and metal fragments at the crime scene. The evidence of experts in atmospheric physics, meteorology and aeronautical engineering, combined with the results of various experiments, demonstrated the complexity of airborne particulate matter: size alone is not the determinant. The metal-to-paint ratios lose their significance if the crime scene and other sources are affected by wind blown fragments. Furthermore, the appearance of precision in the ratios was deceiving because the electron microbe analysis is only semi-quantitative.

Transfer of particles under the Locard principle was supported by visual examination only. And the Locard principle was applied selectively: it explained the alleged change in Splatt's son's ratio after washing, but no attention was given to the static ratio of Splatt's clothes after washing.

The Rendell case

Mr Rendell was convicted of the murder of Yvonne Kendal in 1980, at the Supreme Court of Dubbo in New South Wales. Rendell was sentenced to life imprisonment. After serving over seven years in prison, Rendell was released. Then, pursuant to s 475 of the Crimes Act 1900 (NSW), an Inquiry was conducted into the guilt of Rendell (the *Hunt Report*). On 23 June 1989, Mr. Justice Hunt recommended that Mr Rendell be granted a pardon.

Ms Kendal died instantly on 30 July 1979 of a gunshot wound. Rendell owned the rifle which discharged, killing Kendal. Rendell did not dispute that there was physical contact with Kendal immediately prior to the rifle discharging. He maintained that he did not know how the rifle discharged. There were no witnesses. The Crown relied on circumstantial to infer Rendell's intention. Three of the five salient circumstantial issues involved scientific evidence. The Crown alleged that a guilty conscience of the accused could be implied from, first, the blood stains around the basin in the bathroom, and secondly, the lack of fingerprints on the rifle, both being attempts by Rendell to destroy the evidence.

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Blood tests to establish the presence of blood around the basin were conducted. At the Inquiry, the scientist 'acknowledged...the sample of what appeared to be blood on the wash basin was no more than only probably blood and that she was unable to say whether it was human or animal blood'. The *Hunt Report* concluded that virtually no weight should be attached to this evidence.

Fingerprints were taken by a detective and subsequently by the forensic scientist. The latter results were used to corroborate the earlier fingerprint tests. However, the scientist 'failed to take into account the other tests which the rifle had undergone before she carried out her own tests'. This is a clear affront to basic scientific principles and contributed significantly to the *Hunt Report's* conclusion that the evidence for the Crown was unreliable.

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III — The Synthesis

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A — Practical Considerations

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Unreliability in scientific principle

The use of preliminary tests to draw positive conclusions occurred in the tests for the presence of blood in *Chamberlain* and *Rendell*, in tests for the detection of foetal blood in *Chamberlain*, and in *Splatt* with respect to the bipolarisation analysis and seed identification. It appears that uncritical attitudes to scientific test evidence has permitted recurrent use of preliminary tests in evidence.

Preliminary tests should only be used to guide scientists in the direction of further testing. The use of such results in evidence in court should be minimal. Even accompanied by statements that the test is non-conclusive will not remove the aura of scientific accuracy that surrounds scientific tests. Scientists sometimes do not know the specificity limits to the tests they use. Lawyers need to be aware not only to challenge an expert's credentials and expertise, but also to seek independent expert advice to gauge the reliability of tests results.

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Unreliability in scientific interpretation

(a) Patterns of similarities

Patterns of similarities to establish a common origin occurred in each of the five case studies. The entire prosecution case in *Splatt* employed this method...The same effect also occurs from the use of preliminary tests, as in *Chamberlain* and *Rendell*, where the results do not disprove the accused's guilt; they are merely consistent with it.

Scientific testing 'should be a search for dissimilarities, not for similarities'. It is a scientific principle that tests be 'designed to disprove the original assumption' of the accused's guilt, that is, to exclude the suspect. The risk in testing for a pattern of similarities is that it implies the assumption of guilt is correct. This strengthens the implication of the common origin of crime scene samples to the suspect. The *Shannon Report* referred to this risk of heightened assumption and stronger implication as 'unconscious bias'.

The risk in asserting results are similar or consistent is in the effect it creates on the minds of the jury, counsel and judges. 'No dissimilarities' or 'not inconsistent with' are effectively the same as 'similar to' or 'consistent with'. The scientific connotation in these expressions is limited, but a jury cannot be 'expected [to] be attuned to the scientific nuances'.

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B — Theoretical Considerations

Each level of scientific testing must be scientifically accurate. It may be argued that one legally unreliable fact, in conjunction with other facts which support the expert's opinion, does not invalidate the opinion. This seems implausible. The reliability of the final test result must be endangered if one of a multiplicity of factors on which the opinion is based is unreliable.

The general lack of recognition of the problem is because both aspects of the scientific dimension are intertwined: potential inaccuracy and the aura of such evidence. This is further complicated by the anomaly that a jury of laymen is expected 'to resolve a dispute between experts on a subject about which they know nothing other than what the experts have told them'. This paper does not take issue with the jury system. But a jury cannot be expected to assess the reliability of scientific test evidence or, at least, not without an explanation of the relevant scientific principles and processes involved.

A Solicitor General for South Australia, JJ Doyle QC, could not have expressed the point more

erroneously: 'The adversarial system adjudicates upon the respective merits of cases. The scientist is concerned with absolute truth or fact'. The law must come to terms with the nature of science and scientific evidence: scientific testing operates by attempting to disprove a hypothesis, not prove it, so that a hypothesis will be accepted until another explanation destroys it. Scientific interpretation relies on statistical probabilities because no test actually and finally proves the hypothesis. The scientists may strive for absolute truth or fact, but results are never proved conclusively. It is imperative that lawyers understand the scientific method so that scientific evidence is used in the law not *because* it is science, but because the principles and processes are *reliable* to the satisfaction of the law.

C — Solutions

While proposed changes to the rules of evidence have so far reflected the opinion that problems of forensic evidence are concerned with admissibility, I argue that this is a misguided approach. The problem of unreliability is endemically embedded in legal misconceptions. Only direct legal education will address the problem at its source. Reforms to the scientific community and the trial process must also be considered to improve standards of accuracy of tests and to account for the reality of the aura of scientific certainty.

Education of Lawyers

Education of lawyers to the existence of the problem of unreliable scientific evidence, and their own lack of awareness, is the most direct solution. To be effective, it must be directed at all levels of the legal profession.

The aim of legal education on this issue ought to be to destroy the aura of scientific reliability and address the legal misconception of science. It is not suggested that lawyers be educated on the intricacies of each and every test: that is impractical and unnecessary. The education content should provide an introduction to scientific concepts and a reference point for further inquiry, much as legal education provides its undergraduates.

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Methods of education

Educational programs need to reach as many lawyers involved in the criminal process as possible. The issue should be a component of the undergraduate law degree subject of Evidence, and a variety of seminars, conferences and short training courses made available to groups of barristers, Legal Aid Commission solicitors, and barristers and solicitors for the Crown.

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Scientific reforms

Scientific standards

Establishing scientific standards is a major reform which requires serious attention to alleviate the problem of unreliable scientific test evidence. The urgent need to legislate for scientific standards is apparent to many forensic scientists. Cost factors are frequently cited as an objection, but this argument lacks full comprehension of the range of reforms.

The major features of reform to scientific standards are:

- national standardisation of test procedures,
- national data bases for all relevant Australian test procedures,
- accreditation of laboratories,
- independent forensic science institutes.

(Citations omitted.)

I note that Ms. Bourke pointed out that some saw the *Chamberlain* case as an aberration, a view with which she disagreed. Indeed, it appears to be a common theme of proven miscarriages of justice that they often are regarded as ‘aberrations.’ The Centre, in its written submissions, characterized the *Morin* case as an ‘aberration.’ Others, too, expressed this opinion. In my view, given the findings which I have made in this Report, and their resonance with similar findings and systemic issues in cases worldwide, it would not only be dangerous, but also inaccurate, to characterize the *Morin* case as an aberration.

(vi) Panel of Wrongfully Convicted

During Phase VI of the Inquiry, AIDWYC organized a panel of persons who had been wrongfully convicted of serious crimes. Their evidence touched numerous issues, ranging from the use of specific types of evidence in their convictions, to the impact that this tragic situation has had on their lives, and the lives of their families.

Their evidence, and the evidence of experts who testified generally as to the causes of wrongful convictions (including the misuse of science) are fully elaborated upon in a later chapter.

(vii) *R. v. Roberts*

I was provided with a number of court decisions bearing upon the use of science in criminal prosecutions and, more particularly, the role that hair and fibre evidence has played, or should play, in such prosecutions. Several are referred to in the context of specific recommendations, but it is opportune to comment on one of them, *R. v. Roberts*,⁵² since it has more general relevance to the Centre of Forensic Sciences.

Mr. Roberts was convicted of the murder of a woman who lived in an apartment directly beneath his own. Loose human hair was found on the body of the deceased and on her bed and nightshirt. This hair was compared to that of Mr. Roberts. Mr. Dieter VonGemmingen, an analyst with the CFS, was called by the Crown to testify to the results. In all, Mr. VonGemmingen determined that 26 of the hairs found on and around the deceased were similar to Mr. Roberts' hair.

No expert evidence was called at the trial to dispute or question the reliability of these findings. Crown counsel and the trial judge considered this evidence to be important and significant. The Crown spent a great deal of time on it in his closing address. The trial judge referred to Mr. VonGemmingen's evidence as being "of extreme importance in this case."

Mr. VonGemmingen testified at the trial that he could not say with certainty that the hairs had come from a particular individual's head, but he

⁵² (1977), 34 C.C.C. (2d) 177 (Ont. C.A.).

could say from his analysis that the hairs were similar to one another, and that if they were mixed up he could not then distinguish one from the other. He also testified as follows:

Q. Well, when you establish similarity what are you basically establishing, if you agree with me, is that there could be maybe even a strong possibility the hairs come from the same source?

A. That's correct. My understanding of similarities is one step short of positively saying that it came from one particular person.

Q. Right. So you can say 'similarity' and you can talk in terms of possibilities because you have no mathematical and statistical figures at your disposal you may not speak in terms of probabilities, is that correct?

A. I think I can speak in probabilities with respect to experience and with respect to my opinion, yes.

Q. Just before I leave you, I want this clear in my mind that when you think about these similar characteristics and you give an opinion based on you experience that there is a strong possibility the hairs came from the same source, speaking now of the unknown hairs and the sample hairs from Roberts?

A. Yes.

Q. Yes, you mean to say as a possibility that you are not armed with any probabilities for me in terms of mathematical reference?

A. Not with mathematical reference. All I can say it is highly probable.

Q. Yes, all right, what you are trusting is this scientific intuition that you have developed over the last 13 years, your ability to look at this unbelievably complicated distribution of pigmentation granules, and make some sense out of it?

A. Oh yes, you can. You see this is the beauty of the comparison microscope. You have the one in question and one known hair. When you have them lined up,

when you see these pigmentation granules carry over from one-half of the hair to the other half, when they are so similar and so the same *then you must come to the conclusion that this is the same source.* (Emphasis added.)

Mr. Roberts appealed his conviction to the Court of Appeal for Ontario. The Court considered fresh evidence, including that of Dr. Robert Jervis, who testified that the differences in concentration of the trace elements in the hair found on the deceased's body (said by Mr. VonGemmingen to be similar to Mr. Roberts' hair), and hair strands known to have come from Roberts' head, were such as to make it "very unlikely" that the hair was, in fact, hair from the appellant. The Court allowed the appeal, concluding as follows:

Taken in the context of the whole evidence, including the fact that the appellant testified, and in view of the importance, understandably, placed on VonGemmingen's evidence, this new evidence, in my opinion, is of sufficient strength that it might reasonably affect the verdict of the jury. It may be that the Crown at the new trial will be able to discredit or diminish the effect of this new evidence. That will be for the jury to determine.

A second trial was held and Mr. Roberts was acquitted.

Mr. Lucas was asked about the *Roberts* case in his testimony before the Commission. He accepted that the case was one where a hair examiner at the CFS asserted an opinion well beyond that which he was entitled to give.

In March, 1978, Mr. Lucas wrote an article in the Crown's Newsletter about the *Roberts* case. This is what he wrote, in part:

At the original trial in Kitchener, the examiner stated his findings and quite properly expressed his conclusion during direct examination. During a very lengthy and complex cross-examination, he reiterated this conclusion several times; however, at one point he did state that to him, "similar" meant "one step short of certainty". In this statement he erred since hairs do not permit this sort of a statement to be made.

Mr. Lucas denied that he was trying to defend the CFS. He acknowledged, however, that the purpose of the article was to suggest that the evidence given to contradict Mr. VonGemmingen was based on a technique which the CFS and other labs had rejected. Counsel for the Morins alleged that this reflected a lack of objectivity on Mr. Lucas' part:

Q. And, I'm going to suggest to you, sir, that in essence, your article is really an example of bias, if you will, that is perhaps reflected, a lack of objectivity, that is being reflected in your views of the Morin case.

That, when you reviewed the Roberts case, a conviction of a man who was subsequently found innocent, spent years in jail prior to that, in fact, twice as long as Mr. Morin, as it happens, your reaction, sir, as a forensic scientist and a member of the Centre of Forensic Sciences, out of which the questioned evidence came, is not to try and find out what's wrong with the institution and the people within it from whence the evidence came. But is rather to try and defend the institution and its employees. Do you agree, sir?

A. No, sir.

Q. You don't. You don't think that perhaps a more appropriate way to react to the problem that arose in the Roberts case, and what was said in the Roberts case, was first of all to quote your expert correctly? And to examine how things could go so wrong, that a man could spend three years in jail as a consequence of what one of your people said?

A. I think I did quote him correctly in the quote that I used. That certainly is my recollection of it. I don't recall the other portion that you read, or I certainly would have quoted that. Obviously, I overlooked it or didn't see it.

Q. And you don't this, sir, that your article might have been better addressed to the problem of a man having spent three years in jail as a consequence of one of the people who worked at the Centre?

A. You mean an article directed to Crown attorneys? I don't think so.

Mr. VonGemmingen did not suffer serious repercussions for his actions in the *Roberts* case; Mr. Lucas could only confirm that VonGemmingen was verbally admonished, although he thought that the punishment went beyond that, but could not say for certain. He could not recall any instance of someone being dismissed from the CFS for overstating evidence or improper analysis.

(viii) Crown Policy Manual

By letter dated November 14, 1997, the Acting Deputy Attorney General provided me with two new Crown policies, one relating to jailhouse informants and one relating to physical scientific evidence. She noted that these policies were intended to address the issues raised at the *Morin* criminal proceedings and at this Inquiry. She also reflected that “these and all other Crown policies will be reviewed in light of your final recommendations.”

The Crown Policy on Physical Scientific Evidence was jointly prepared and adopted by the Ministry of the Attorney General and the Ministry of the Solicitor General and Correctional Services. (See *Crown Policy - Physical Scientific Evidence, dated November 13, 1997, Appendix K.*) It does indeed specifically respond to a number of the issues raised at this Inquiry. The Ministries are to be commended for this policy. Subject to several comments made in the context of specific recommendations, I endorse much of the policy’s contents. In particular, the policy articulates well:

- the obligation of full disclosure of scientists’ reports, underlying documentation, tests or other material which the defence believes is relevant to making full answer and defence;
- the duty of Crown counsel, upon defence request, to support access to forensic scientists (retained by the Crown or consulted by the police) and to advise scientists of the necessity of providing the defence with appropriate documentary access;
- the duty of Crown counsel to disclose information potentially impeaching defence experts;

- the appropriate relationship between Crown counsel and forensic scientists. I quote:

It is the clear duty of government scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice. (See the decision of the English Court of Appeal in *R. v. Ward*, [1993] 1 W.L.R. 619. See also D.M. Lucas, "The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits" (1989), 34 J. of Forensic Science 719).

The necessity for including in the report any information adverse to the Crown is a matter of educating those who prepare scientific or other expert reports. *The Crown should advise all experts that they are not to take an adversarial position, but are to provide the Crown with the results of any tests or information which, arguably, may assist the accused, so that the Crown may make proper disclosure, even though the person preparing the report considers that the results of the test or other information is irrelevant*" (page 233-4 Martin Committee Report). Government scientists will be aware of this duty via this policy. Non-government scientists should have this duty brought to their attention, perhaps by including a copy of this policy with the letter of retainer. The information which ought to be provided in the report includes information about all tests conducted by the forensic laboratory in connection with or relevant to the case, including those with inconclusive or negative results. It does not necessarily include generally available background scientific information or opinion relevant to or used in interpreting the results of testing.

In the normal course scientists employed in government sponsored forensic laboratories are exposed more frequently to police investigators and to Crown counsel than to the representatives of the defence. Indeed, the function of the forensic scientist is in part to assist in the investigation of crime which is carried out primarily by police officers. The forensic

scientist, therefore, assists police officers. (See Roger, "Does Forensic Science Have a Future", J. For. Sci. Soc. (1984) 543.) Investigators must necessarily provide background information arising from their investigation in submitting articles for testing so that forensic scientists can determine the most effective and appropriate scientific approach to possible evidence. This gives the scientist a measure of autonomy in the making of investigative decisions, but also exposes the scientist to the police theory of the case. Finally, where the results of the scientific investigation inculcate the suspect, the scientist becomes a necessary witness for the prosecution and will be exposed to, and be part of, the development of the Crown's case. All of this is, of course, entirely proper and does not mean that the integrity of the scientists is suspect.

However, because forensic scientists working in government-operated laboratories are more familiar with police and prosecution personnel and with prosecutorial approaches and concerns, *there may be a tendency for them to feel 'aligned' with the Crown. In some jurisdictions this understandable relationship between the prosecution and forensic scientists has resulted in a perception on the part of the scientists that their function was to support the police theory. Such a perception is wrong and has the potential to contribute to a miscarriage of justice.*

Forensic scientists are subject to their own rule of ethics which require impartiality ... While it is not the Crown's or the scientist's function to supervise or control the professionalism of the other, the purpose of this joint policy is to reinforce the necessity of a clear and impartial presentation of the evidence to the court. This will protect the integrity of the role of government scientists and ensure that their evidence is available with all its legitimate force in the criminal process.

In seeking information and advice from forensic scientists, this policy emphasizes that Crowns are seeking a candid opinion. Candor is necessary in order to assist the Crown in exercising its prosecutorial discretion and in preparing its case for trial. The value of early case conferencing is highlighted by Mr. Justice Archie Campbell in his 1996 *Bernardo Investigation Review*. Participation in case conferencing where

possible will provide Crown counsel with the opportunity to clarify issues and establish an appropriate relationship with forensic scientists. *Where possible it is preferable that a police officer be present to take notes of any meetings with the forensic expert and those notes should be disclosed to all parties;* (Emphasis added.)

- the way in which forensic scientific evidence should be presented at trial.⁵³ I quote:

Scientific evidence should be presented in such a way that everyone involved (witness, counsel, judge, jury) understands the evidence and its relationship to the issues in the case. In cases tried by a jury this is particularly challenging for counsel.

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The presentation of difficult scientific evidence can be greatly enhanced by the use of visual aids (overhead slides, computer projections, charts, demonstrations, videotaped tours of facilities). *It could be dangerous to use a visual aid in court without first reviewing it with the scientist to ensure that it accurately conveys the true force and effect of the evidence.* If it is proposed that such aids are to be used to make scientific evidence more understandable to the jury, their use should first be canvassed with the judge out of the presence of the jury, and most often in a pre-trial conference or motion prior to the selection of the jury. Where such aids are used they should be properly exhibited and thereby entered into the record. If aids include audiovisual presentations (overhead projection or slides) Crown counsel should endeavour to preserve the record by attempting to have representative portions of such material exhibited, and, where appropriate, making observations on the record.

The objective of the Crown must always be to see that the expert's opinion is presented to the jury with nothing more or less than its legitimate force and effect. It is important to ensure that experts understand

⁵³ I have recommended below that the policy that a scientist's concern about misleading evidence should be communicated to the officer-in-charge be modified.

that, if at the end of their testimony they are concerned that a misleading impression of their evidence has been left with the triers of fact, they should relay that concern to the officer-in-charge as soon as possible. The information given to the officer by the scientist triggers an immediate disclosure obligation to the defence. Counsel should be aware that scientists from the Centre of Forensic Science are alive to this obligation.

In presenting expert evidence it is, of course, important to remember that many scientific fields use technical jargon which has a different connotation in normal parlance. *It is important then that counsel presenting scientific evidence to a jury take care to ensure that the expert's opinion is expressed in terms which permit the jury to either appreciate the significance of such technical jargon, or that these terms are appropriately translated to less idiosyncratic terms;* (Emphasis added.)

- the continuing obligation of the Crown to disclose information or evidence of a forensic nature relevant to an outstanding appeal.

(ix) Systemic Expert Witnesses

During the systemic phase of the Inquiry, I heard, *inter alia*, from a panel of pre-eminent forensic scientists, each nominated as a witness by AIDWYC, the Morins or the Centre of Forensic Sciences. Counsel for these parties worked together in presenting these panellists' views in a non-adversarial way. Many of their views coincided; all were of great assistance to me. I also heard from Dr. Young, who outlined the remedial actions taken at the Centre since the Morin prosecution. These actions were intended to address not only those concerns arising out of this Inquiry, but also the recommendations previously made by Mr. Justice Campbell in the *Bernardo Investigation Review*. I find it more convenient to summarize the evidence of these and other witnesses in the context of my specific recommendations. However, I briefly highlight their biographies at this point.

Dr. Edward Blake is an American forensic scientist who specializes in DNA work. In 1976, he received his doctorate in criminology (forensic science) from the University of California, Berkeley. He has worked as a

consultant in forensic biology since 1975. He has published a number of papers on DNA and related topics. He was a member of a team of scientists (agreed upon by all parties) who conducted the DNA tests which resulted in the exoneration of Guy Paul Morin and David Milgaard. He has been involved in 15-20 post-conviction wrongful convictions cases in the United States and Canada. He also noted that, in many cases, his DNA testing has incriminated the accused or confirmed guilt.

Dr. James Robertson has been the Director of Forensic Services, an agency of the Australian Federal Police, since 1989. He was a Lecturer in the Forensic Science Unit of the University of Strathclyde for nine years, and then became a senior forensic scientist with State Forensic Science of the State Service Department of South Australia. He specialized in the examination of trace evidence, especially hair and fibres, and in the examination of Cannabis plants and prepared products. He has published a number of articles on forensic science, including hair and fibre analysis.

Dr. William Tilstone is the Executive Director of the National Forensic Science Technology Centre in St. Petersburg, Florida. He is also a Courtesy Professor in forensic science at the University of Central Florida. He received his Ph.D. from the University of Glasgow in 1968, and was for many years a Lecturer and (subsequently) Professor of Forensic Science at the University of Strathclyde. In 1984, he became the Director of Forensic Science for the Government of South Australia. He was appointed to his current position in 1996. Dr. Tilstone is a pharmacologist, a serologist, and one of the forensic scientists who first introduced DNA technology in Australia. He has published about 120 papers in forensic science, and has acted as forensic consultant to governments around the world. He is also a member of the ASCLD accreditation board.

Dr. James Young is the Chief Coroner for the Province of Ontario and the Assistant Deputy Solicitor General, Public Safety Division, in Ontario. He is also an Associate Professor in the Department of Pathology at the University of Toronto. He received his Doctor of Medicine in 1975, and worked at the Penetanguishene General Hospital for several years until he became Regional Coroner for the Metropolitan Toronto and Central Region in 1982. He has written and lectured extensively, and presided over a number of Coroner's Inquests.

(x) An Overview of Accreditation and Quality Control

The American Society of Crime Laboratory Directors (ASCLD)'s Guidelines for Forensic Laboratory Management Practices, 1986, define quality assurance as "a system of activities the purpose of which is to provide to the producer and users of a product or service the assurance that it meets defined standards of quality with a stated level of confidence." The Centre's written submissions make clear that the 'cornerstone' of the Centre's quality assurance program is the accreditation program administered by ASCLD's Laboratory Accreditation Board (ASCLD/LAB). ASCLD is a professional organization comprised of crime laboratory directors. Its accreditation program is a voluntary program for crime laboratories to ensure that they meet set standards. The Centre first received accreditation in 1993 and will seek re-accreditation this year.

The Centre outlined the accreditation process in some detail:

The program includes a comprehensive set of principles and specific standards, each of which is assigned a rating of "essential", "important" or "desirable". To achieve accreditation, a laboratory must be inspected by a group of ASCLD/LAB trained inspectors, who must find that the laboratory meets 100 percent of the essential criteria, 70 percent of important criteria, and 50 percent of desirable criteria. Over time, many criteria have changed from desirable, to important, to essential, with the mandatory standards evolving to become more stringent. In 1993, the CFS obtained a score of 100 percent in essential, 100 percent on important, and 90 percent on desirable criteria.

The process of achieving accreditation starts with a preparatory period, during which a laboratory must review and, if necessary, align its existing practices and policies to comply with ASCLD/LAB requirements. This is followed by a written application, and then an in-depth on-site inspection by an ASCLD/LAB team whose function is to assess fairly and objectively all criteria which apply to the applicant laboratory. None of the criteria are negotiable. In the case of the last CFS accreditation, the team was comprised of six people, who together had expert knowledge in the various disciplines of each section of the CFS. Each inspector

was required to have come from an accredited laboratory, to have successfully completed the ASCLD/LAB inspector training course, and to have been certified by the Board. The inspection occupied a full working week, during which time the inspection team reviewed CFS policies and case files, observed the hands-on work of staff, and interviewed all staff.

Accreditation lasts for a five year term. To retain accredited status during that term, a laboratory is expected to maintain accreditation standards. This is demonstrated by (1) an annual review report filled out by the laboratory director, confirming continued compliance with all criteria; and (2) proficiency testing reports submitted by approved external test providers to the ASCLD/LAB Proficiency Review Committee. Any discrepancy in a proficiency test requires that immediate corrective action, including a new re-testing of the individual analyst responsible for the discrepancy. In addition, ASCLD/LAB will investigate any complaint made to it regarding an accredited laboratory during the five year term, and the Board reserves the right to re-inspect a laboratory during the accreditation term. Sanctions against an accredited laboratory include probation, suspension and revocation of accreditation.

Highlights of the current ASCLD/LAB accreditation requirements particularly relevant to the issues raised at the Inquiry include the following:

- The laboratory must have written objectives which are clearly determined, articulated and communicated.
- There must be written and well understood procedures for personnel issues such as job requirements and personnel evaluations, as well as for the handling and preservation of evidence, preparation and security of case records, and maintenance and calibration of instruments.
- There must be critical evaluation of scientists by supervisors, who must carefully review all laboratory activities, methods and personnel.
- There must be a training program for each

functional area. Every trainee must perform a series of proficiency tests which must be satisfactorily completed before the analyst is assigned to independent casework. In addition, there should be a formalized personnel development program (involvement in professional organizations, staff development seminars, technical training programs etc.), as well as a forensic library and a system for review by personnel of new literature.

- There must be a system to ensure the integrity of all physical evidence within the control of the laboratory. A chain of custody record must be maintained, documenting the history of each evidence transfer over which the laboratory has control. Evidence must be sealed and marked for identification, and must be protected from loss, cross-transfer, contamination or deleterious change. Every effort must be made to save as much material as possible for possible re-analysis in the future.
- The laboratory must have a documented quality system, including a quality manual which is under the control of a quality manager. The quality system must be reviewed by laboratory management at least once yearly to ensure its continued suitability and effectiveness. In addition, there must be a yearly internal audit of each accredited discipline, with audit reports to the laboratory Director, including recommendations for improvements. The quality system should include a complaint mechanism, and a plan for corrective action when discrepancies are identified.
- Technical procedures must be documented. Procedures used must be generally accepted in the field or supported by scientific data. Procedures must use controls and standard samples to ensure the validity of results. Reagents, instruments and equipment must be routinely tested and maintained for reliability.
- Case records, such as notes, worksheets etc. must be generated and kept by the laboratory, with each

page of every document bearing the case identifier. Documentation to support conclusions must be such that in the absence of the examiner, another competent examiner or supervisor could evaluate what was done and interpret the data. The case record should include records of all case-related conversations.

- Conclusions reported must be within the range of acceptable opinions of knowledgeable individuals within the field of forensic science, and be supported by sufficient scientific data. Limitations of the results should be clearly stated. Obscure, overly technical and potentially misleading language is to be avoided.
- A representative number of reports must be subject to a peer technical review. A sufficient percentage of reports should be technically (peer) reviewed for each individual in each area to ensure that the conclusions reported are reasonable and are within the constraints of scientific knowledge. Administrative reviews of all reports must be conducted to ensure the completeness and correctness of the reports issued.
- The laboratory must follow a written procedure whereby the testimony of each examiner is monitored at least once every year, to evaluate the delivery of the examiner's testimony and to ensure that the testimony is scientifically consistent with the findings documented in the case file, including the expression of limitations where necessary. This may involve observation by a peer in court (recommended), review of transcripts, or completion of evaluations by one or more court officers. Feedback to the examiner is required.
- When the validity of results become questioned, the procedures involved must be reviewed and, if necessary, withdrawn from service until an exhaustive review and testing demonstrate that the procedure is no longer a source of error.
- Each laboratory must have a program of proficiency testing which measures the capability of its examiners and the reliability of its analytical

results. Each examiner must complete at least one proficiency test annually in each functional area in which they perform casework. The form of proficiency testing is as follows: Each laboratory must participate in proficiency testing programs in which samples are provided by external test providers approved by ASCLD/LAB. Such testing must be conducted annually in every discipline in which a laboratory seeks accreditation. In addition, each laboratory should conduct appropriately spaced inter- or intra laboratory proficiency testing of individual examiners using the re-examination, blind, or known standards techniques. The method of testing must be documented. For compliance with this criterion the laboratory must be conducting such tests in all accredited disciplines.

- All scientists in trace evidence must have a bachelor's degree in a natural science or in criminalistics. In addition, training must take place in the laboratory, such that a trainee demonstrates competence in all applicable areas of examination prior to performing independent case-connected examinations. Experience/training outside the laboratory may be substitute for internal training only to the extent that it is relevant.

The ASCLD/LAB accreditation program is not the only one in existence. The International Standards Organization (ISO) has created an ISO 25 Guide. Dr. Tilstone explained that this is an overall international guide for lab accreditation or performance. The ASCLD/LAB program meets most, but not all, of its expectations. The two main differences are that ISO 25 requires labs to conduct audits of its operations each year, whereas this is not an absolute must for ASCLD/LAB accreditation, and ISO standards are very strong and very strict on document control, whereas ASCLD/LAB is "pretty silent" on the issue.

Australia has its own National Association of Testing Authorities (NATA) forensic program. The requirements of this program are combined with the ASCLD/LAB and ISO requirements under the auspices of a joint NATA-ASCLD/LAB accreditation program. Its accreditation criteria were filed as Exhibit 262 in the proceedings before me. Dr. Robertson explained that the joint program differs from ASCLD/LAB accreditation in several respects. For example, it requires laboratories to conform to almost all of its

criteria (whereas ASCLD/LAB only requires conformity with less than half), its occupational health and safety criteria are much stronger, and it mandates greater documentation of test methods and procedures.

The Centre outlined in detail how accreditation and other measures taken by it since the Morin proceedings and during this Inquiry provide quality assurance:

The training, proficiency testing and peer review now required by accreditation is designed to provide assurance, on an ongoing basis, that CFS scientists are competent to perform both the technical and communicative aspects of their work. An enhanced training program, including written materials and formal testing, provides the initial basis for this assurance. Technical manuals ensure that all scientists are adhering to specified procedures and protocols. In subjective analyses, including hair and fibre analyses, a second scientist now must always conduct an independent review of the findings of the primary scientist. Administrative reviews of all files are required to ensure that the findings reported by scientists are always scientifically acceptable, and technical reviews of a sampling of files are required to ensure that the case files contain notes which support all reported findings.

The program of proficiency testing measures the capability of examiners and the reliability of analytical results. Each examiner must complete at least one proficiency test annually in each functional area in which they perform casework. In addition, the laboratory is required to participate in proficiency testing programs in which samples are provided by external test providers approved by ASCLD/LAB. Such testing is conducted annually in every discipline. In addition, the CFS conducts other internal and external proficiency testing of individual examiners using the re-examination (re-doing an existing case), blind, and known standards techniques. The CFS intends to increase the regularity of this testing and has appointed a quality manager to drive this process.

The program of court monitoring at the CFS involves observation of testimony in court by another scientist or supervisor who evaluates the objectivity, clarity and

scientific accuracy of the testimony provided. This is carried out at least once per year for every individual. The CFS has also launched a 'court card' program which will permit written feedback from counsel regarding the performance of a scientist following each trial. On some occasions, particularly if a concern arises regarding the testimony of an individual, transcripts are also reviewed.

Where any of these processes reveals a deficiency, immediate steps are taken to remedy the work done and to provide remedial assistance to the individual scientist involved. Where appropriate, scientists are taken off casework while training is provided. If the required improvement is not achieved, the scientist will be demoted or terminated.

Over and above accreditation, the CFS has also adopted all of the standards set by the Technical Working Groups (TWG) (composed of forensic scientists from North America, Europe and Australia) in both the DNA and trace evidence areas. These standards set out a recommended approach on matters such as what tests and procedures should be used, and in this respect are more stringent than the standards of ASCLD/LAB. The CFS is an active participant in all of the TWG groups applicable to CFS work, except for document examination.

.....

In 1997 ... a number of full time quality assurance positions were created, including a quality assurance manager, four other quality assurance personnel, a standards officer and a training officer. The members of this new quality assurance unit will be senior scientists. They will be devoting all of their time to maintenance of the quality assurance program, including design and implementation of training and proficiency testing, and follow up with corrective action when necessary. One of the first tasks recently assigned to the standards officer is the creation of a comprehensive policy manual, the substance of which will include many of the issues which have been raised in the Inquiry.

.....

In addition to these requirements, since the mid 1980's, the CFS's underlying program of hands-on training by senior scientists has been enhanced to include greater standardization through more reliance on written training manuals and increased formal testing. Also, the CFS has recently examined the training programs of leading forensic institutions around the world, with a view to incorporating new ideas into its own programs.

The CFS encourages all scientists to participate in seminars, conferences etc. put on by other institutions, such as the American Association of Forensic Sciences of which a number of senior CFS staff are members. One CFS scientist has recently participated in a course on report writing which took place in England. The CFS has conducted staff meetings and seminars on the lessons to be learned from this Inquiry, and will also be showing staff video-tapes of evidence from this Inquiry relating to forensic science. Staff of the CFS are also encouraged to participate in the Canadian Society of Forensic Science which provides educational programs as part of its annual meetings, which meetings the CFS periodically hosts.

The CFS recognizes, as was stated by Dr. Robertson, that the difficulty with training programs, as with other quality assurance matters, is that not only must opportunities be provided, but management must also ensure that staff make use of such opportunities in a meaningful way. This was one motivation for the creation of the new quality assurance unit described above. It is submitted that the full time attention to quality assurance of a group of senior scientists is the best way to achieve meaningful quality assurance within an institution such as the CFS.

Cautionary Notes As to Accreditation

The Centre's commitment to the accreditation process, and to enhanced training and quality assurance standards is commendable. I am satisfied that the Centre's policies are evolving to meet, and often surpass, standards set in the forensic community. There are some acknowledged deficiencies in the minimum standards set by the accreditation process, however. In part, these are reflected in the specific recommendations which are contained later in this Report. As well, many of the improvements

reflected in the Centre's submissions are, as of yet, untested. This has prompted some parties to urge upon me that I recommend an internationally conducted audit in 12 to 24 months to ascertain the true extent to which the announced improvements are realized. I address this concern later in the Report as well.

There are two overriding concerns which I need express, both for the benefit of those at the Centre who will be working on quality assurance in the upcoming years, and to explain the recommendations which follow.

As the Centre's submissions point out, the forensic scientist must excel both in the technical and communicative aspects of his or her work. I am satisfied that accreditation, and the enhanced programs reflected in the Centre's submissions, go far in ensuring that its scientists perform the technical aspects of their work well. However, many of the most significant failings identified here have to do with the communicative aspects of the scientist's work, and I embrace within those aspects the interpretation of technical tests and their significance, and the objectivity brought to bear upon those interpretations. As Dr. Blake noted:

[M]erely getting the right answer in a test is only part of what a forensic scientist does. It's interpreting that work in the context of the case situation, and being able to present that kind of information effectively to a lay audience that is also a critical part of what a forensic scientist does. And the accreditation process, I would suggest, deals with that aspect only minimally.

Some of accreditation's 'weak spots' pertain to the communicative aspects of the scientist's work: for example, the court monitoring requirement is minimal; currently, ASCLD criteria do not address the content of reports in any significant way; others areas are better addressed by ISO or NATA requirements.

The Centre has already alluded to Dr. Robertson's concern:

The difficulty in these matters is that mostly what they are testing is management having put in place the opportunities for people to participate in training and development. One of the key challenges for managers is to ensure that staff actually do take those opportunities in any meaningful way.

It follows that accreditation and the other enhanced quality control measures are of vital importance, but they do not represent the complete answer. The *Morin* case is illustrative. During the currency of the *Morin* proceedings, communication skills were already a key component of recruitment and training at the Centre. I was told that Ms. Nyznyk underwent a mock trial. She passed proficiency tests and she was taught technical and interpretative accuracy, clarity and objectivity, including the forthright disclosure of the limitations of the evidence. Nonetheless, Ms. Nyznyk overstated evidence, misunderstood the literature pertaining to her discipline, communicated poorly and with lack of precision and lost objectivity. With accreditation came increased technical reviews, together with administrative reviews of all reports. However, Ms. Nyznyk's reports were administratively reviewed by Mr. Erickson. He re-did all of her testing prior to the second trial (*i.e.*, effectively performed a technical review). He was the section head at the time. Mr. Erickson's conduct did not meet standards then in existence either. Everybody at the Centre was educated as to the dangers of contamination. Nonetheless, it occurred and its existence was suppressed. I am sure that the CFS was empowered back then to take action to address the overstatement of evidence. Accreditation has not fundamentally changed that either. All of this to say that the CFS standards in existence at the time (which met or surpassed the forensic community's standards at the time) cannot be faulted for many of these failings. Accreditation does not necessarily bring with it an assurance that these failings would not be repeated. I do not believe that Dr. Young would suggest otherwise. The recommendations which follow place particular emphasis on those changes which can best ensure a culture of independence and objectivity, together with the communication of accurate and fair findings.

(xi) Recommendations

Recommendations are in bold print. Some commentary may precede or follow these recommendations.

Recommendation 2: Admissibility of hair comparison evidence

Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to

justify its reception at a criminal trial as circumstantial evidence of guilt.

A central issue at this Inquiry has been whether hair and fibre comparison evidence should be admissible in a criminal trial as circumstantial evidence of guilt. The issue raises fundamental questions not only about hair and fibre comparison evidence, but also as to the admissibility generally of individual pieces of evidence in a wholly or largely circumstantial case.

At Guy Paul Morin's trials, evidence was led by the prosecution that the necklace hair was microscopically similar to Guy Paul Morin's known hair samples, such that he could have been the donor of the necklace hair. Prior to the second trial, analysis of Christine Jessop's classmates' hairs showed that the necklace hair was also microscopically similar to the known hair samples of two of these classmates, such that either one of them could have been the donor of the hair. Mr. Erickson advised the Crown that the hair comparison had extremely limited probative value. Nonetheless, the experts detailed the various points of comparison at the second trial, as did Crown counsel in his closing address. Two of the jury's questions were directed to the necklace hair comparison.

The necklace hair comparison yielded nothing more than the conclusion that Guy Paul Morin, two of Christine Jessop's classmates and countless others could have been the donors of the necklace hair. Assuming that this conclusion is scientifically valid, should it be heard by a jury?

Trial judges are entitled in law to exclude evidence sought to be tendered against an accused where its probative value is exceeded by its prejudicial effect. Trial judges fully exercise this discretion in the context of evidence which is presumptively inadmissible against an accused — the most obvious example being evidence which reflects adversely upon the accused's character. Canadian courts have not subjected hair and fibre comparison evidence (and certain other categories of forensic evidence) to the same critical analysis. This may be because the prejudicial effect of the evidence is less obvious. Equally likely, it may be that courts have not seriously thought about the true probative value of this evidence.

Evidence that an accused cannot be excluded as the donor of a hair left by the perpetrator may, in limited circumstances, have a high degree of probative value. For example, if the offence was likely committed by one of

two suspects, evidence that a hair left by the perpetrator could have come from one suspect and could not have come from the other may be highly probative. Dr. Robertson pointed to the situation of an automobile accident, where the authorities wish to identify the driver and know from the start that it was one of the four people who were in the car. Evidence that only one of the individuals cannot be excluded as the donor of a hair left on the driver's seat may be of real probative value.

In the vast majority of cases, however, such evidence has extremely limited probative value: it merely permits the trier of fact to infer that the accused is one of a limitless class of persons who cannot be excluded as the perpetrator based upon this analysis.

The forensic scientists who appeared before me generally agreed that hair comparison evidence was valuable as an exclusionary tool, but had limited utility as an inclusionary tool. Roger Cook testified:

A. My own personal view is that hair analysis has got limited significance, but it has got some, and, as I say, you can say that the hair didn't come from an individual and sometimes that's very helpful to the individual concerned.

.....

Q. But, when we start talking about fractured medullas, and stuff like that, I wonder, really, is there much significance that can be gleaned from it for the purpose of forensic application?

A. Well, I think, if you asked a number of different forensic scientists that question, you'd get a wide range of answers. Some people would say that it's very useful, others would say that it's got limited significance, and I'd fall into that camp.

Dr. Blake said this:

The problem with hair is that when the hairs are microscopically similar, you don't know what that means. That is, you don't know what value that microscopic comparison has in disproving a false hypothesis. And it's the inability to assess your own ability to disprove a false hypothesis that is the problem

that hair examiners, and maybe to some extent, fibre examiners are confronted with. We can't make that evaluation like we can with genetic testing. That doesn't mean that the whole exercise is completely useless; it just means that the inherent information content of the exercise is usually much less.

Mr. Lucas testified that hair comparisons have considerable value for exclusionary purposes, but only limited value for inclusionary purposes. He was of the view that we cannot do without hair and fibre evidence given its usefulness in some circumstances. Mr. Lucas did a study a few years ago and found that in many murder cases the evidence was very useful in excluding individuals, and in at least offering the potential of a relationship between two persons, a thing and a person, or two things. Mr. Lucas added that in cases where there are no bodily fluids, "there isn't a lot more to assist."

Mr. Erickson testified that he did not think that the necklace hair should have been introduced into evidence in Mr. Morin's trial; its probative value was too limited. On a more general level, he supported the introduction of rules which would limit the admissibility of hair evidence:

Q. Yes. Do you think, sir, that perhaps when you only have a single hair comparison, for example, as you did in this case, that the evidence simply shouldn't be given in those circumstances. That it's only when you have a substantial number of unknown hairs that correspond to known hairs, that that would give you a necessary degree of reliability to a finding, to present it to a jury?

A. Well, I wouldn't totally exclude doing a single hair analysis because that single hair may have a number of features and characteristics that could be related back to the comparison sample. But, if it's a hair that has very few features or lack of features — is what I'm saying, and one could only say it could be from this source, I don't say that should not be done.

.....

Q. [I]t would seem, then, that you would acknowledge that a rule of exclusion by the courts that would have been sufficient to exclude any evidence about the necklace hair in the Morin case would be a rule that could meet with your approval.

A. Yes, I felt that way when I wrote that letter.

.....

Q. The other thing I'm going to suggest to you, sir, and it really is perhaps not so far off your views either, is that hair analysis should only be allowed to be presented to a jury as an inclusionary item of evidence, if there is a one-to-one match between at least one questioned hair and the known hairs. Do you have a problem with that, sir?

A. I have no difficulty with that at all.

The fact that comparative hair analysis has no utility other than in the forensic context, primarily to connect persons to crimes, can lead to its misuse. Mr. Crocker said this:

Q. And the concern that I would express to you is that if you have a science of hair analysis that has, as its primary objective, the connecting of individuals with crime that has no other objective scientific use, that there can be a risk that it can ultimately be misused?

A. Oh, I'm sure it has been. I think — what the courts really have to look at is, I suppose, the persons training and experience and reliability because there are some terrible, terrible opinions being given, that I'm aware of.

The added difficulty with hair comparison evidence is that its prejudicial effect may be substantial, since the scientific opinion brings with it an aura of respectability and infallibility. The length and complexity of testimony which must be examined to produce the minute conclusion that the accused cannot be excluded as the donor of the unknown hair has the potential to mislead the jury and cause the testimony to acquire a prominence and importance out of all proportion to its insignificance. Any trier of fact, hearing an exhaustive detailing of the minutiae of hair similarities found, could easily (and understandably) conclude that only some legal or professional restraint prevents the experts from saying that the compared hairs come from a common source. Indeed, Mr. McGuigan very persuasively suggested in his jury address that, apart from the experts, a 'common sense' approach to the hair and fibre evidence led inexorably to the conclusion that Christine Jessop had been in the Morin Honda.

In *R. v. Mohan*,⁵⁴ the Supreme Court of Canada articulated the four criteria for the admissibility of expert testimony:

1. relevance;
2. necessity in assisting the trier of fact;
3. the absence of an exclusionary rule; and
4. a properly qualified expert.

In the context of necessity, Sopinka J. reflected that the need for the evidence is assessed “in light of its potential to distort the fact-finding process.” He did note that the “possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.”

Similar considerations are noted by Sopinka J. as an aspect of the relevance of the proffered evidence. He noted, as I have, that trial judges are empowered to exclude expert evidence that is otherwise logically relevant on the basis that its probative value is overborne by its prejudicial effect. In this regard, he stated:

Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is “whether its value is worth what it costs” ... Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded in this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant

⁵⁴ (1994), 89 C.C.C. (3d) 402 at 411 (S.C.C.).

evidence on these grounds is more properly regarded as a general exclusionary rule...Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves. (Emphasis added.)

In *R. v. Melargni*,⁵⁵ Moldaver J. (as he then was) applied a “threshold test of reliability” to novel expert evidence. One question which he asked himself was whether the jury was likely to be overwhelmed by the “mystic infallibility” of the evidence, or whether the jury will be able to keep an open mind and objectively assess the worth of the evidence.

Sopinka J., citing *Melargni* with approval, concluded that

expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Some may suggest that the reliability of hair and fibre analysis, when used for inclusionary purposes, should be revisited as if it represented ‘novel’ science. The authors of “Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?”⁵⁶ would certainly take

⁵⁵ (1992), 73 C.C.C. (3d) 348 (Ont. Ct. (Gen. Div.)).

⁵⁶ Clive Smith and Patrick Goodman (1996), 27 Columbia Human Rights Law Review 227 at 229.

that position, contending that this evidence has rarely been subjected to this kind of scrutiny in the United States. Some excerpts follow:

Forensic hair comparison analysis has not undergone much challenge in the courts. Some courts have held that hair comparison analysis, standing alone, may not be sufficient to support an arrest or a conviction. Sometimes hair evidence has been *so* tenuous as to be considered improperly admitted. On a very rare occasion, the courts have rejected hair analysis, holding that testimony that two hair samples “*could have come from the same person*” was simply speculation, unsupported by scientific fact.

By and large, however, forensic hair analysis has been generally accepted by our courts for many years, with little fuss or skepticism. It is time for a reevaluation. If the purveyors of this dubious science cannot do a better job of validating hair analysis than they have done so far, forensic hair comparison analysis should be excluded altogether from criminal trials.

.....

[I]t is the thesis of this Article that forensic hair comparison analysis has been accepted uncritically into criminal prosecutions, without being subjected to the validation required of any legitimate science. In forensic hair comparison analysis, as with other such techniques, there are some major concerns that must be addressed before this evidence may be used to deprive an individual of liberty or — in capital cases — life itself.

.....

There is little difference between the techniques of present-day examiners and those used at the turn of the century. Perhaps the microscope is a little clearer, but the art remains largely unchanged. Basically, a technician is provided with a certain number of questioned hairs (hairs from an unknown source, found at the crime scene) to compare with a set of known hairs from the victim and a set of known hairs from the suspect. The known hairs of the victim are pulled from the scalp and the pubic region, and mounted together on slides; likewise the hairs of the suspect. The

questioned hairs are also mounted on slides. The questioned hairs are then placed on one side of a binocular microscope, and the victim's and the suspect's hairs are separately compared to them. The examiner compares two hairs at a time, preferably along their entire length, since hair characteristics may vary considerably from root to tip.

The examiner identifies the hair as coming from one of three racial groups — "Caucasian", "Negroid", or "Mongoloid". The examiner also identifies whether the hair is from a particular body part — scalp, pubic or limb hair, for example — and sorts the hair accordingly, only comparing hairs which come from the same body part. Then, after inspecting the hairs for colour, diameter, and various other characteristics, the examiner determines whether the questioned hairs are microscopically "indistinguishable", and therefore consistent with the hypothesis that they originate from the same person, or "distinguishable", and therefore excluded from that hypothesis.

.....

In a blind testing procedure carried out by the Law Enforcement Assistance Administration (LEAA), 240 crime laboratories from around the United States took part in a comparative study. Out of ninety responses for the hair portion of the survey, the proportion of laboratories submitting "unacceptable" responses on a given sample — either failing to make a match or making a false match — ranged from 27.6 to 67.8 percent.

.....

Apologists for the technique of forensic hair comparison analysis may argue that their trade does not occur in a vacuum, and that their conclusions are buttressed by other evidence. This is correct when a confession confirms pubic hair evidence of a rape. However real life can also cut the other way, enhancing the probability of an error, with the technician's belief that the "right" person has been arrested tainting the approach to the hair comparisons. If it is to be accepted as probative of anything, hair analysis must stand or fall on its own merits, without reference to other evidence in an actual criminal case.

In the least, paraphrasing *Mohan*, there is a danger that hair and fibre evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence may be accepted by the jury as being virtually infallible and having more weight than it deserves. Yet its probative value may often be insufficient to justify its reception.

The answer to these concerns is often said to be this. Evidence in a circumstantial case must be viewed cumulatively. Each piece cannot be examined in isolation. Accordingly, this evidence, viewed together with the other circumstantial evidence, may permit a reasonable inference that the accused is the perpetrator. Any deficiencies in the evidence's value can be fully explored by the defence.

It is true that a piece of circumstantial evidence cannot be examined in isolation. However, it is equally true that it must pass some litmus test or threshold test in order for it to have sufficient probative value to overcome its prejudicial effect and justify its reception. Recognizing that a piece of evidence must be viewed in context and as part of a circumstantial case does not mean that a trial judge is to abandon any effort to weigh the probative value against the prejudicial effect in a circumstantial case.

There are at least two dangers here. The first danger is that worthless evidence plus worthless evidence plus worthless evidence may still logically amount to a worthless case, but it may not be properly evaluated as such by the trier of fact. Indeed, it is my view that this reflects part of the cause of Mr. Morin's conviction. The jury was inundated with so many pieces of evidence which had dubious probative value — "it could have been his hair," "it could have been her hair," "it could have been his fibres," "it could have been blood in his car," "he didn't go to her funeral," "he didn't assist in her search," "he sounded unconcerned when he talked about her death," "he stared straight ahead at a television when a police officer questioned his mother" — that they acquired in the jury's minds a significance which they did not (or should not) possess, individually or cumulatively. In my view, this inundation of what has been labelled by some as 'junk evidence' also likely infected the jury's assessment of other evidence which was so patently unreliable that it might otherwise have been easily discarded — Paddy Hester, Janet Jessop's funeral scream evidence, the dog scent evidence, the in-custody informer evidence.

The second danger is that other evidence which has some weight and is worthy of consideration by a jury (whether or not sufficient to sustain guilt) may elevate this evidence of minimal value to a heightened credibility it should not possess.

American courts have wrestled with the admissibility of hair and fibre comparison evidence which yields no more than ‘it could have been the accused.’ Generally, the courts have held that hair comparison evidence is admissible, the inconclusiveness of the evidence being a matter of weight. In some cases, the courts have demanded that there be other evidence linking the accused to the offence. In *State v. Stallings*,⁵⁷ for example, the Court of Appeals of North Carolina concluded that the totality of the evidence raised no more than conjecture of the accused’s identity as the perpetrator. As to the microscopic hair comparison analysis evidence, the Court commented:

Unlike fingerprint evidence, however, comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity. [citation omitted] Our review of the North Carolina cases involving comparative microscopy evidence indicates that it must be combined with other substantial evidence to take a case to the jury.

With respect, I am not sure that this analysis goes far enough.

There are cases in which the courts have found hair comparison evidence “contingent, speculative or merely possible” where there is an insufficient connection between hair found at the crime scene and the accused’s hair.⁵⁸

⁵⁷ 334 S.E.2d 485 at 486 (N.C. App. 1985). See also *State v. Johnson*, 338 S.E.2d 584 (N.C. App. 1986); *State v. Faircloth*, 394 S.E.2d 198 (N.C.App. 1990) On the other hand, commentators have noted that the hair comparison may be tainted by the analyst’s belief in guilt; see Clive A. Stafford Smith and Patrick D. Goodman, “Forensic Hair Comparison Analysis: Nineteenth Century Science of Twentieth Century Snake Oil” (1996), 27 Columbia Human Rights Law Review 227 at 259.

⁵⁸ See *State v. Williams*, 400 S.E.2d 131 (S.C. 1991), where the Court held that the admission of evidence of hair found on a blanket seized 19 months after the crime, which lacked sufficient connection to the accused, was unfairly prejudicial.

The Oklahoma District Court in *Williamson v. Reynolds*,⁵⁹ following the 1993 decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*,⁶⁰ held that microscopic hair comparison evidence was unreliable and inadmissible:

[I]n analyzing Petitioner's case under the guidelines of *Daubert*, this court has found an apparent scarcity of scientific studies regarding the reliability of hair comparison testing. The few available studies reviewed by this court tend to point to the method's unreliability. Although probability standards for fingerprint and serology evidence have been established and recognized by the courts, no such standards exist for human hair identification. Since the evaluation of hair evidence remains subjective, the weight the examiner gives to the presence or absence of a particular characteristic depends upon the examiner's subjective opinion.

.....

This court has been unsuccessful in its attempts to locate *any* indication that expert hair comparison testimony meets any of the requirements of *Daubert*. Not even the "general acceptance" standard is met, since any general acceptance seems to be among hair experts who are generally technicians testifying for the prosecution, not scientists who can objectively evaluate such evidence. (Emphasis original.)

.....

[T]here is no research to indicate with any certainty the probabilities that two hair samples are from the same individual

This court, therefore, finds that the introduction into evidence of expert hair testimony at Petitioner's trial was irrelevant, imprecise and speculative, and its

⁵⁹ 904 F.Supp. 1529 (E.D.Okla. 1995).

⁶⁰ *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993), holding that a federal trial judge is obliged under the Federal Rules of Evidence to screen all scientific evidence for both relevance and reliability. Compare *Mohan*, *supra*.

probative value was outweighed by its prejudicial effect. *The state of the art of hair analysis has not reached a level of certainty to permit such testimony.* Although the hair expert may have followed procedures accepted in the community of hair experts, the human hair comparison results in this case were, nonetheless, scientifically unreliable. This court recognizes the long history of admissibility of such evidence, but as the *Daubert* Court stated, “[H]ypotheses ... that are incorrect will eventually be shown to be so.”⁶¹ (Some emphasis added.)

I do not think it appropriate to articulate any hard and fast rules as to when such evidence should be admitted in a criminal trial. As Dr. Young pointed out, the potential uses of the evidence will vary case by case, and advances in technology may alter the value of a particular analysis. In my respectful view, however, it is appropriate for trial judges to undertake a far more critical analysis of the admissibility of this kind of evidence. My own view is that hair comparison evidence of the kind introduced in the *Morin* case should rarely be admitted for inclusionary purposes.

Nothing that I have said is intended to inhibit the *informed* use by investigators of hair comparison evidence *for investigative purposes*. Similarly, nothing that I have said is intended to inhibit the use of this evidence for exclusionary purposes or to discriminate from within a finite group of persons who could have contributed an unknown hair. Finally, I appreciate that hair specimens may, unlike those found in the *Morin* case, be amenable to DNA testing. My comments do not address the comparison of hairs through DNA analysis.

In its submissions, the CFS reflected the recent approval of new equipment to facilitate the work of the hair and fibre unit:

[I]t is important that a properly equipped laboratory keep up with changes in technology which improve the ability to discriminate between hairs and fibres. To this end, the CFS Director has recently approved the purchase of a variety of new equipment, including an FTIR spectrometer with accessories, new accessories for the microspectrophotometer, fluorescence stereo

⁶¹ At 1556-1558.

microscopes, a new fluorescence comparison microscope and a fibre finder. In addition to enhancing the ability to discriminate between hairs and fibres, this new technology may also improve the timeliness of hair and fibre analysis. Notably, new technology has also made it possible to photograph or otherwise make a printed reproduction of all exhibit materials. This is now done at the CFS on a routine basis and the reproduction is retained in the case file. The hair and fibre unit at the CFS will now be one of the best equipped in the world.

Counsel for the Morins suggested that I should be undeterred by this recent decision to invest heavily in hair and fibre-related equipment and recommend that the unit's work be sharply curtailed and the financial resources directed elsewhere. With respect, I do not agree. As noted above, I continue to recognize that there are legitimate uses to be made of hair and fibre evidence. Indeed, added technology *may* enhance those uses some day. To paraphrase Mr. Lockyer's submissions made in another context, should the new technology permit the Centre's analysts to exclude one person from unjust prosecution or conviction, the money will have been well spent.

Recommendation 3: Admissibility of fibre comparison evidence

Evidence of forensic fibre comparisons may or may not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of the accused's guilt. However, the limitations upon the inferences to be reliably drawn from forensic fibre comparisons need be better appreciated by judges, police, Crown and defence counsel. This requires better education of all parties, improved communication of forensic evidence and its limitations in and out of court, in written reports and orally.

Similar issues (to hair analysis) are raised in connection with fibre comparison evidence. Based upon the expert testimony before me, I expect that there is a greater number of cases where fibre comparison evidence has sufficient probative value to justify its reception as circumstantial evidence of guilt. I make this observation with some reticence. Mr. Cook, whose evidence was most impressive, outlined in some detail the tenor of the Jackson and Cook Study (referred to at some length earlier in this chapter). The message which I took from his analysis, apart from the irrelevance of the

study to the Morin prosecution, was how little one can reliably say about the significance of fibre similarities. Such similarities may well be evidence of direct contact between the suspect and the victim or the crime scene. However, the real issue is the extent to which science can say, with a degree of reliability, that direct contact, as opposed to other possibilities, explains the fibre similarities. Dr. Tilstone noted the problem:

If you look at [the issue of unreliable science] in regard to your prompting about hairs and fibres, an example of an illustration that I've used in documents which we have, is that if a lab finds no differences in two sets of fibres, one recovered from person A, and the other recovered from person B, the conclusions that can be drawn from that can be extremely limited. And in particular, the question has to be posited: Is this fibre material there because of secondary transfer. In other words, did it come because both person A and person B had been in contact with some third common source?

And very often, the answer to that is, it depends on the numbers of recovered fibres, and people will say if you find a lot of fibres, it must have come from primary contact, and if you find very few, it must have come from secondary contact. And I think some people would use most. Now I don't believe that that's good science, because I don't know of any way you can challenge that hypothesis and say there is a certain number of fibres above which it's primary contact, and below which it must be secondary contact. And I'm using secondary contact deliberately rather than contamination. It could have been some kind of legitimate situation.

So these are just two examples, the common blood grouping and the interpretation of transferred fibres, which I think if they're subjected to rigorous principles of scientific testing leave you with conclusions which are not at all compelling.

Much more research needs to be done in this area. There may well be cases where the quality and quantity of the fibre findings permit certain inferences to be safely drawn. Not surprisingly, I am unable to define what those cases are. However, the experts (and I) agree that the *Morin* case was not one of those cases. This Inquiry has served to identify the limitations upon the inferences that can reliably be drawn from fibre comparisons,

particularly based upon only a handful of fibres. A number of fallacies associated with fibre comparison evidence have been noted. The inherent fragility of comparing two extraneous fibre populations has been exposed. The relevance of environmental contamination has been spotlighted. It is important that judges, investigators, Crown and defence counsel correctly apprehend these limitations. As in the *Morin* case, fibre comparisons, correctly apprehended, *may* not have sufficient probative value to justify their reception as circumstantial evidence of guilt in a criminal case.

Recommendation 4: Admissibility of preliminary tests as evidence of guilt

Evidence of a preliminary test, such as an ‘indication of blood,’ does not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

Robert White testified at Mr. Morin’s trials that he found indications of blood on three areas of the Morin Honda. The quantity of the substance detected in the Honda was insufficient to permit its positive identification as blood. Mr. White’s evidence was based on the results of the lowest level of serological test. This type of test is commonly known as a presumptive test, because it alone cannot positively identify the nature of a substance under examination with any real degree of reliability.

Dr. Blake questioned whether such testing is capable of answering any material fact in dispute, and pointed out that in some American states such results would be inadmissible. Mr. Cook testified that presumptive tests are sometimes reported in England. He accepted that they can be misleading, and suggested that whenever they are used they should be heavily qualified. Mr. Lucas did not agree that preliminary tests should be inadmissible in court. He felt that they have a value, although their limitations have to be explained.

In my view, the probative value of a preliminary test showing ‘indications of blood’ is even more tenuous than the necklace hair comparison. The *Morin* case is illustrative. Robert White’s evidence demonstrated that the Morin Honda contained invisible stains that *might or might not be* human blood. There is no suggestion that he could say that the stains were likely human blood or how likely that was. He could not say anything about the likelihood that the stains were Christine Jessop’s blood.

There is no suggestion that he could say anything about the likelihood that such minuscule indications of blood would be found in any vehicle, particularly a well-used and untidy one. With respect, it is no answer to say that the limitations of this evidence were explained to the jury (which they were). It is equally no answer to say that this evidence has little probative value by itself, but becomes significant when taken together with the other evidence (which was the approach advocated by the Crown). The trial judge's rulings on admissibility demonstrated his view that this evidence acquired heightened probative value, when considered together with the other evidence against Mr. Morin. With respect, I disagree. The simple answer is that the evidence was valueless in proving that Christine Jessop was in the Morin Honda and ought not to have been admitted.

Though there was no allegation here that Mr. White overstated his findings, I agree entirely with the comments of author Judy Bourke on this issue, which bear repeating:⁶²

The use of preliminary tests to draw positive conclusions occurred in the tests for the presence of blood in *Chamberlain* and *Rendell*, in tests for the detection of foetal blood in *Chamberlain*, and in *Splatt* with respect to bipolarisation analysis and seed identification. It appears that uncritical attitudes to scientific test evidence has permitted recurrent use of preliminary tests in evidence.

Preliminary tests should only be used to guide scientists in the direction of further testing. The use of such results in evidence in court should be minimal. Even accompanied by statements that the test is non-conclusive will not remove the aura of scientific accuracy that surrounds scientific tests. Scientists sometimes do not know the specificity limits to the tests they use. Lawyers need to be aware not only to challenge an expert's credentials and expertise, but also to seek independent expert advice to gauge the reliability of test results.

Absent special circumstances, evidence of preliminary testing results such as 'indications of blood' has insufficient probative value to justify its

⁶² Judy Bourke, "Misapplied Science: Unreliability in Scientific Test Evidence" Parts I and II (1993) 10 Aust. Bar Rev. 123 at 187.

reception as circumstantial evidence of guilt in a criminal case. The emergence of such evidence in notorious miscarriages of justice or potential miscarriages of justice is not co-incidental. Its use in the Morin case before the jury is illustrative. It was also used by the trial judge to support the admissibility of the necklace hair comparison. The necklace hair comparison was used to support the admissibility of the ‘indications of blood’ evidence. With respect, it should not have been so used.

Recommendation 5: Trial judge’s instructions on science

Where hair and fibre comparison evidence or other scientific evidence is tendered as evidence of guilt, the trial judge would be well advised to instruct the jury not to be overwhelmed by any aura of scientific authority or infallibility associated with the evidence and to clearly articulate for the jury the limitations upon the findings made by the experts. In the context of scientific evidence, it is of particular importance that the trial judge ensure that counsel, when addressing the jury, do not misuse the evidence, but present it to the Court with no more and no less than its legitimate force and effect.

In this regard, reference should be made to the judgment of the Ontario Court of Appeal in *R. v. Terceira*.⁶³ Finlayson J.A. advocates similar kinds of instructions in the context of DNA testimony. I also note the trial judge’s (Campbell J.) careful instructions to the jury, citing the “reasons for you to take a good close look at the DNA evidence,” cautioning the jury not to be “overwhelmed by any aura of scientific authority advanced by any of the DNA witnesses” and emphasizing not to “get bedazzled or unduly swayed.”

Recommendation 6: Forensic opinions to be acted upon only when in writing

(a) No police officer or Crown counsel should take action affecting an accused or a potential accused based upon representations made by a forensic scientist which are not recorded in writing, unless it is impracticable to await a written record. Where a written record is not obtained prior to such action, it should be obtained as soon thereafter as

⁶³ *R. v. Terceira*, [1998] O.J. No. 428.

is practicable.

(b) The Crown Policy Manual and the Durham Regional Police Service operations manual should be amended to reflect this approach. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

(c) Where a written record is only obtained after such action, and it reveals that the authorities acted upon a misapprehension of the available forensic evidence, police and prosecutors should be mindful of their obligation to take corrective action, depending upon the original action taken. Corrective action would, for example, include the immediate disclosure of the written record to the defence and, if requested, to the Court, where the forensic evidence has been misrepresented (even inadvertently) in Court. It would also include the re-assessment of any actions done in reliance upon misapprehended evidence.

In the Morin investigation, the police obtained and executed search warrants, arrested Guy Paul Morin and testified as to the available forensic evidence at a bail hearing, all in the absence of any written documentation from the CFS. As I have earlier reflected, this approach was fraught with danger — the scientific findings were poorly communicated and poorly understood. It follows from this recommendation that the CFS should either provide an interim report to investigators, record on tape their interim findings or read and sign an officer's notes which articulate those findings and the limitations upon them. There may be exigent circumstances which do not permit the creation of a written record — for example, the communication of an opinion by telephone, followed by the need to immediately apprehend a dangerous offender. In these limited circumstances, a written record should be obtained as soon thereafter as is practicable.

There was widespread support for a recommendation of this kind from the parties at the Inquiry, including the Durham Regional Police Service, Detective Fitzpatrick and the CFS itself. Dr. Young thought it was an excellent suggestion to have scientists record their interim findings, to have the police and the scientist sign them, and to give a copy of the record to the police.

A similar policy to that recommended here is in effect in parts of

Australia. Dr. Robertson testified:

Q. Doctor Robertson, one of the systemic issues that arises out of this Inquiry has to do with this scenario. Police officers submit material to a forensic laboratory, such as The Centre of Forensic Sciences for analysis, awaiting anxiously for the results in order to determine whether or not a particular suspect should be charged with an offence, that an oral report is given as to the results, obtained by the forensic scientist.

And then down the piece, issues arise as to what it was precisely that was communicated by the forensic scientist to the police, whether the forensic scientists overstated his or her findings, or whether or not the police took more from the findings than were stated.

Are you ever asked, or your forensic scientists ever asked to provide oral opinions to the police in advance of a formal written report, and how do you deal with a potential communicative problems that could arise in that situation?

A. Well, the answer to the question is yes, it's not an uncommon occurrence. The NATA guidelines have something to say about it, so I guess if we deal with the black letter of rows to begin with, Section 83, page 26 of the documents being submitted, that says first of all that preliminary or interim reports, which isn't just what you are asking about, must be clearly indicated as such. 831 says that:

Where preliminary or interim reports are issued by telephone, the following must be recorded in the case record. The date and time of the telephone call, the test examination result given and the name of the person to whom the results were given.

So that's the minimum standard that we apply. If the individual, as is often the case, certainly in our organization, is physically there, we get that person to also sign that they have agreed with what is written, and the case filed. And we would follow up a telephone conversation by faxing the individual a written statement of what was actually agreed, if it was in any way substantive, and we would follow that up quickly

by a properly typed interim statement which again, spelled out what we'd agreed.

Recommendation 7: Written policy for forensic reports

The Centre of Forensic Sciences should establish a written policy on the form and content of reports issued by its analysts. The Centre should draw upon the work done by forensic agencies elsewhere and the input of other stakeholders in the administration of criminal justice who will be receiving and acting upon these reports. In addition to other essential components, these reports must contain the conclusions drawn from the forensic testing and *the limitations to be placed upon those conclusions.*

Criticisms of CFS reports were advanced by several parties before the Commission. They were criticized for being structured in a way which favoured the prosecution's point of view. They were criticized for not including the limitations on the scientist's opinion. They were criticized for failing to articulate the background information received, the hypotheses which the test results were directed to and the significance of any findings reached.

For example, Dr. Robertson testified:

[T]hey don't seem to me, from the limited number I've seen, I have to say to really lay a foundation for why the exercise was undertaken in the first place, what the results, if you really like, actually add up to, and what sort of conclusions really can be safely drawn from them.

The inadequacy in forensic reporting is not an issue unique to the CFS. Dr. Blake testified that he has reviewed numerous DNA reports in the United States and frequently found them to be deficient in their ability to communicate findings effectively and accurately. Dr. Robertson testified that reports can be meaningless, shorthand versions which do not give enough information to indicate what was done, and which do not permit the reader to evaluate the work. Indeed, Dr. Robertson stated that it is not generally the technical testing that creates difficulties in a case, but rather what is said about the tests in reports and in court. I share that view, with particular reference to the *Morin* case. Having said that, I note Mr. Cook's evidence that the form of reports prepared by Ms. Nyznyk in the *Morin* case would not

currently be acceptable at his laboratory in England, though they did meet forensic standards at the time.

In my view, the CFS must establish a clear written policy on the form and content of forensic reports. ASCLD/LAB says little about how reports should be written. Policies have been implemented in other jurisdictions. For example, Mr. Cook introduced me to the Forensic Science Service's "A Guide to Writing Expert Witness Statements." It not only articulates for its scientists how reports are to be written, it also notes that its scientists should "be prepared to justify any deviation from this to your checking officer or section manager." CFS policy should contain similar language.

In formulating its written policy, the CFS should continue to draw upon the collective wisdom in other jurisdictions,⁶⁴ as well as the input of the various stakeholders in the administration of criminal justice in Ontario who must receive and rely upon these reports. I note that Dr. Robertson specifically endorsed the idea of stakeholders sitting down together and working out how reports should be structured in the particular jurisdiction. A clear and accurate forensic report undoubtedly will also obviate the necessity of *viva voce* evidence in a number of cases.

Dr. Tilstone testified about the policy in place at the South Australia Forensic Service:

There was a fairly lengthy policy on reporting, and that policy said that reports had to contain five following parts. They had to have a chain of custody which defined the items which were examined, and where they came from. They had to define the tests which were conducted. They had to specify the results of that testing. They had to specify the conclusions which could be drawn from the testing, and they had to specify the limitations which could be placed on those conclusions.

In regard to the conclusions and the limitations, the policy instructed staff to report in exclusionary terms, so the policy was always that findings should be interpreted from the point of view of what they

⁶⁴ Dr. Tilstone testified that the NATA program in Australia contains provisions which speak to the issue of how reports should be written.

excluded, the things that were not possible as a result of these findings. And the policy also required that they should state the limitations on non-exclusions.

However, the policy did not require that staff gave a list of all possible alternative explanations, and language such as other explanations were possible was accepted. And the view was that that simple language at least alerted the reader to the fact that there were, indeed, as it says, other explanations possible for these findings.

Dr. Blake essentially agreed with the South Australian model, but added that reports should include a fairly detailed statement of the hypothesis being tested and the reasoning process by which the conclusions were reached. Dr. Blake described the content of one of his DNA reports. He suggested that it was in a form which allowed for a critical review of whether the conclusions were supported by the data. It included:

- a background section, outlining the hypothesis being tested;
- an inventory of evidence, to deal with chain of evidence issues;
- a description of the evidence to be tested and what the preliminary evidence testing process involves;
- a description of the parts of the evidence where there is interesting biology, and how that biology is identified;
- a description of the various technical processes employed;
- the results and conclusions;
- tables of background information on gene frequency and summaries of the analytical data; and
- photographs of the exhibits.

Mr. Cook testified that reports at his laboratory are quite detailed. They outline the circumstances of the case and the information on which the scientist bases his or her interpretation. They also spell out the significance of any findings that were made. He stressed the need to itemize all exculpatory evidence in a report.

Dr. Robertson stated that the precise content of a report is a matter of detail, but the guiding principle should be that the report be candid and aimed at non-concealment. He explained that at his laboratory, an appendix is added to every hair and fibre report which, broadly speaking, “covers the protocol that’s used, the methodology, basically the approach, the thinking that goes into the hair examination and the comparison process.” He added that it is impossible, however, to address in a report every conceivable issue which might arise in the adversarial process. It is for that reason that he felt more pre-trial meetings should be held where all the issues can be canvassed (and possibly resolved). Such meetings would also give the scientists time in advance of trial to think about the issues. Dr. Blake agreed.

There were some differences between the approaches advocated by the various scientists to report-writing. For example, Mr. Cook and Dr. Blake favoured more detailed reports. Dr. Robertson and Dr. Tilstone (and the Centre) prefer ‘outline reports.’ In principle, there was consensus that, in the least, reports should accommodate the principles articulated by Dr. Tilstone.

Early at this inquiry, Mr. Lucas agreed that the CFS should review how its reports are written, since their basic format has not changed in many years. He accepted that CFS reports might need to include more information about the limitations of the enumerated findings. Dr. Young, on behalf of the CFS, attended the panel discussion of forensic scientists and found it very helpful. He accepted that the CFS needs to change its report-writing style. He stated that the CFS has been examining the issue for several months, including the exclusionary model proposed by Dr. Tilstone. He had no difficulty with the most important suggestion, namely, the articulation of the limitations on the findings reached.

In its written submissions, the CFS indicated that it intends to adopt the five reporting requirements advocated by Dr. Tilstone. It said:

The reports will now include: (1) chain of custody; (2) definition of tests conducted; (3) results of tests

conducted; (4) conclusions; (5) limitations on conclusions. In regard to the conclusions and the limitations, the CFS has been evolving toward the use of an exclusionary perspective, and intends now to require staff to write in exclusionary terms in appropriate cases. As stated by Dr. Tilstone:

[I]f I wrote a report for you that said they matched, then you're going to go away with one impression of the strength of that. And you probably might not even test it, whereas if I wrote a report that said: On the basis of the tests which I've enumerated and I used, I cannot exclude that these things had a common origin, but other explanations are possible, then I have alerted you to the limitations of my findings, and given you an easy way to test the strength of it. And we can then engage in a dialogue where we try to work out what the strength is.

The expression of limitations will not require a dissertation on all possible explanations for the results. It will be sufficient to note something to the effect that "other explanations are possible". The CFS does not believe that very lengthy reports, examples of which were provided to the Commissioner, are necessary, nor are they practical at an institution with the volume of work handled by the CFS.

The CFS also has adopted Dr. Robertson's recommendations in part:

[T]he CFS is developing standard written material which will describe the nature of tests conducted, including definitions of important terminology. This material will be provided to police, Crowns and defence and will be appended to reports as a matter of course.

The CFS is to be commended for its recognition of the problem and the initiatives described. However, there is one important aspect of this issue which I need further address. In its written submissions, the CFS also said this:

As for the written reports of the CFS in the Jessop case, the CFS does not accept any suggestion that they

were inadequate or misleading. These reports stated that the fibres or hair "could have" come from a particular source, or were "similar to" that source, which are scientifically accurate conclusions. The position of the CFS is that the written report should contain only the scientific facts and conclusions, not the factual inferences which can be drawn from them pertaining to a particular case. However, the scientist is always available to discuss the significance of findings in a particular case, with any party who requested such information. In addition, it must be noted that the CFS produced (and still does) a manual for police and Crowns, also available to the public, which discusses *inter alia* the significance of findings in respect of each type of testing. At the time of the Jessop case the manual, entitled "Laboratory Aids for the Investigator", stated respect to hair and fibre evidence, "It is not possible to establish that a hair definitely came from a specific individual".⁶⁵ One purpose of the "significance of findings" discussion is to ensure that the police and Crowns have a basic understanding of the science and an appreciation of its potential evidentiary significance.

With respect, this misconceives the problem. The real problem here was not that the scientists advised counsel in writing that, for example, the body site fibres definitely or conclusively came from Guy Paul Morin or that the necklace hair or the car hairs conclusively came from Guy Paul Morin or Christine Jessop. If the full extent of the scientists' conclusions had been that the fibre similarities may or may not be evidence of direct contact, but do not favour that inference over other possible inferences in all the circumstances (their present view), then the CFS' point would be well taken. The problem here was that the scientists expressed views as to the significance of, for example, the fibre comparisons in establishing direct contact, or the unlikelihood of environmental contamination or random occurrence. When these are the conclusions which the experts are prepared to swear to, they must make their way into a report. In other words, a report must reflect how the scientific work bears upon the hypotheses being tested. With respect, it is not sufficient that, arguably, the most important aspect of the scientists' opinions is not in the report, but that the scientists are available for

⁶⁵ Exhibit 44B, p. 37. Today the guide states (Exhibit 44A, p. 57): "While it is possible to determine that a particular hair did *not* come from a particular individual, it cannot be conclusively stated that a hair came from a specific individual."

discussion. Further, resort to the CFS manual does not address this problem.

In the context of the necklace hair comparison, I do not agree with the Centre's written submissions that the contents of Ms. Nyznyk's report dealing with this hair would be adequate by today's standards. In my view, articulation of the conclusions to be drawn and the limitations upon those conclusions should compel a report more closely akin to Mr. Erickson's letter to Mr. Scott dated March 28, 1990. As I previously indicated, I found that Mr. Erickson's letter clearly and accurately outlined the conclusions which could and could not be drawn from the necklace hair and the limitations upon those conclusions.

I also recognize that reports may have to be supplemented as the hypotheses to be tested become known to the analysts. Similarly, if the analyst expresses an opinion, for example, as to environmental contamination, he or she should briefly list the facts communicated to him or her upon which the opinion is based. I do not accept that such requirements would be unduly burdensome. Indeed, if the scientist expects to articulate these opinions in trial testimony, it follows that their documentation would facilitate the expression of opinions with accuracy and scientific rigour. Apart from the invalidity of the opinions expressed in the *Morin* case, I was struck by how loose and imprecise the testimony was. This was not merely a product of a difficult, subjective discipline, but of a fundamental lack of scientific rigour.

Recommendation 8: The use of appropriate forensic language

The Centre of Forensic Sciences should endeavour to establish a policy for the use of certain uniform language which is not potentially misleading and which enhances understanding. This policy should draw upon the work done by forensic agencies or working groups elsewhere and the input of other stakeholders in the administration of criminal justice. This policy should be made public.

I have already reflected in the context of my findings that scientists (within and outside the Centre) sometimes express the same conclusions in different terms. At other times, they express different conclusions using the same terms. Some of the terms, even if used uniformly, are potentially misleading.

The concern over the variable and confusing use of language was shared by several of the systemic witnesses who testified before me. Dr. Young said that it is very important to get past language difficulties so that the police can obtain and act upon correct information. I agree.

Dr. Blake agreed that it would be advisable for language to be standardized. He did note that it is inevitable that some scientists will use terms differently and that counsel need be alive to that concern and clarify the meaning of terms used. Dr. Robertson felt that more work should be done to formulate guidelines as to the best terms to use and their meanings. He thought that a glossary of terms would be useful.

Work is currently being done in the England and the United States on developing appropriate standardized terminology. Dr. Robertson testified that in the United States a working group called TWIGMAT (Technical Working Group for Material Sciences) has already developed some standards for fibre comparisons and is working on doing the same for hair comparisons. The CFS should draw upon the experience and conclusions of this group and others in order to establish its own policy regarding the uniform use of language which is not misleading. Dr. Robertson also thought it important for all the various stakeholders in the administration of justice to collectively examine terminology in order to understand and influence it. The Ontario Crown Attorneys' Association cautioned me that scientists ultimately must determine the language which best reflects what they have to say. The caution is a wise one. However, I concur with Dr. Robertson that, since the goal here is accurate, user-friendly language for use in a court setting, the Centre should work together with the other participants in the criminal justice system to formulate appropriate language.

I understand that some change has already occurred at the Centre to address the concerns expressed at this Inquiry as to the use of language. Again, it is my view that the written policies which are developed should be readily accessible to the public and the participants in the justice system.

Recommendation 9: Specific language to be avoided by forensic scientists

More specifically, certain language is demonstrably misleading in the context of certain forensic disciplines. The terms 'match' and 'consistent with' used in the context of forensic hair and fibre comparisons are

examples of potentially misleading language. CFS employees should be instructed to avoid demonstrably misleading language.

There was a consensus that the terms ‘match’ and ‘consistent with,’ in the context of hair and fibre evidence, are potentially misleading.

At Mr. Morin’s first trial, Ms. Nyznyk sometimes used the term ‘match’ to describe the hair and fibre comparisons which she made. Given the limitations upon the discipline, she agreed at the Inquiry that the term is not an appropriate one. Mr. Erickson agreed.

At Mr. Morin’s second trial, Ms. Nyznyk and Mr. Erickson drew some distinction between an opinion that a hair is ‘consistent with’ originating from the same source and an opinion that a hair ‘could have’ originated from the same source. This distinction attributes some heightened significance to the former opinion.

Mr. Erickson testified before me that ‘consistent with’ means the hairs are consistent in all respects. This involves a one-to-one comparison if the comparison is between a known hair and a single unknown hair, or the same range of characteristics in several hairs if the comparison is between a known hair and a number of unknown hairs. Mr. Crocker testified that ‘consistent with’ means that an unknown hair is similar on a one-to-one basis with any given hair in the known sample. Ms. Nyznyk testified that ‘consistent with’ means that there is a match between all aspects of the hairs, although exact one-to-one correspondence is very rare. She added that there is no set number of similar characteristics which will elevate a finding of ‘could have’ to a finding of ‘consistent with.’

Mr. Erickson and Ms. Nyznyk testified that, by comparison, ‘could have’ means that a hair *may or may not* have come from a particular source. Ms. Nyznyk stated that it is based on a finding where some of the features of the various hairs could not be compared. Mr. Crocker testified that it means there is a composite match, *i.e.* no single unknown hair shares all the same characteristics with a known hair, but all the characteristics of the unknown hair are present within the sample of known hairs.

Mr. Crocker referred to a third level of comparison. He stated that the lowest level of comparison is when a hair ‘cannot be excluded’ as originating from a particular source. It means that a scientist found only some (more than

one) 'very good' similar characteristics in the unknown and known hairs.

It appears to me that some may use this term to reflect a weaker level of comparison than 'could have' originated from the same source; others use the terms interchangeably; and still others use the term 'cannot be excluded' as a preferable manner of expressing the same level of comparison, since it is fairer to express conclusions in 'exclusionary' rather than 'inclusionary' terms.

All the witnesses testified that there are variations in the strength of a comparison within each level of comparison. Ms. Nyznyk testified that there is no statistical significance to the various levels of comparison. A higher level of comparison does not refer to a narrowing of the percentage of the population who (in addition to the accused) could be the donor of the relevant hairs or fibres, although one can narrow the population to some extent in hair comparisons by placing a person within a certain group (e.g. blonds). Mr. Erickson testified that a finding of 'consistent with' implies a greater likelihood that a hair or fibre came from a source than a finding of 'could have.' *He defined 'consistent with' to mean more than a possibility, but less than a probability.*

There was evidence before me that efforts have been made in the past to statistically quantify the likelihood that two compared hairs (for example, one from a known source such as the suspect and one located on the victim or at a crime scene) originated from the same source. There is no general acceptance in the forensic community that hair comparisons can be statistically quantified. Indeed, Mr. Crocker was the author of one article which demonstrated the flaws in such an approach. I am satisfied that, at present, the value of hair comparisons cannot be statistically quantified.

The difficulty with the term 'match' needs little elaboration by me. It overstates the connection between similar hairs or fibres. There are multiple difficulties presented by the use of the term 'consistent with.' First, some use the term interchangeably with 'could have' originated or 'cannot be excluded' as originating. The term is now shrouded in confusion. Indeed, one sees examples in the Morin transcript where the evidence of the hair and fibre comparisons is described as 'consistent with,' despite Mr. Erickson and Ms. Nyznyk's evidence before me that there were no such levels of comparison in this case. The trial judge's admissibility rulings, earlier noted, provide examples. Second, the term 'consistent with' may be used by forensic

scientists in other disciplines to mean something different. For example, the jury heard testimony that Guy Paul Morin's pocket knife was 'consistent with' the weapon which caused Christine Jessop's death. I did not take from this evidence anything more than the fact that his knife, and countless others, could not be excluded. Third, to some, 'consistent with' in common parlance would extend to anything which is not inconsistent with (*i.e.* anything which cannot be excluded). Fourth, to some, 'consistent with' implies perfect or near identity of two items. (They would undoubtedly be surprised to hear Mr. Erickson say at this Inquiry that 'consistent with' meant more than a possibility, *but less than a probability.*)

Bernard Robertson and G.A. Vignaux, in their book *Interpreting Evidence: Evaluating Forensic Science in the Courtroom*,⁶⁶ offer the following explanation of the difficulty with the term 'consistent with':

Worst of all is the word "consistent," a word in (unfortunately) common use by forensic scientists, pathologists and lawyers. To a scientist, and to a dictionary, "consistent with" is simply the opposite of "inconsistent with." The definition of "inconsistent" is precise and narrow. Two events are inconsistent with one another if they cannot possibly occur together. Thus, a person cannot be in two different places at the same instant and so evidence that he was in New York at a particular instant is inconsistent with the proposition that he was in London at the same instant. Anything which is not inconsistent is consistent. Thus, the proposition 'several murders were committed in New York today' is quite consistent with the proposition 'it rained in London today,' although it may be irrelevant.

Unfortunately for clear communication, Craddock, Lamb and Moffat found that lawyers usually interpret "consistent with" as meaning "reasonably strongly supporting," while scientists use it in its strict logical and neutral meaning. When a pathologist says that certain injuries are "consistent" with a road accident there is no implication about whether or not there has been a road accident. It is possible that the injuries could occur given the circumstances that have been described. It is therefore perfectly sensible to say that

⁶⁶ Chichester: John Wiley and Sons, 1995, at 56.

something is “consistent but unlikely.” If there is some genuine dispute about the cause of the injuries what would the pathologist be able to say? He might say that the injuries were consistent with either an assault or a road accident but are more likely to have occurred if there had been an assault than if there had been a road accident. If they are equally consistent with both then they do not help us decide which of them occurred.

The comments of Judy Bourke, in her article on misapplied science,⁶⁷ are also apposite:

The risk in asserting results are similar or consistent is in the effect it creates on the minds of the jury, counsel and judges. ‘No dissimilarities’ or ‘not inconsistent with’ are effectively the same as ‘similar to’ or ‘consistent with’. The scientific connotation in these expressions is limited, but a jury cannot be ‘expected [to] be attuned to the scientific nuances’.

Mr. Erickson and Ms. Nyznyk both testified at Mr. Morin’s second trial that the various hairs and fibres “could have” come from the various sources. It is interesting to note in this context that the trial judge lapsed into the error of describing the hair and fibre ‘matches’ as follows:

Once again, please bear in mind “match” was used to mean consistent with having come from the same source. It does not mean that the two fibres or the two hairs, as the case may be, conclusively did originate from the same source.

There was also agreement amongst the systemic witnesses before the Commission that use of the terms ‘match’ and ‘consistent with’ are inappropriate when describing hair and fibre comparisons. Dr. Tilstone testified that different people ascribe different meanings to the terms. Dr. Blake thought that the terms are misleading and confusing, explaining that even DNA analysis does not prove that two things are identical.⁶⁸ Dr. Tilstone

⁶⁷ Judy Bourke, “Misapplied Science: Unreliability in Scientific Test Evidence” Parts I and II, (1993) 10 Aust. Bar Rev. 123 at 188.

⁶⁸ I do not wish to comment on the appropriateness of the term ‘match’ in the context of highly discriminating DNA analysis. The issue is not before me.

felt that if a scientist does not have a database which allows him to express quantitative information, he should avoid language which implies some quantitative rarity.

In its written submissions, the Centre said this:

It is further acknowledged that the use of the terms "match" and "consistent with" by both Ms. Nyznyk and Mr. Erickson may have been confusing. With respect to the word "match", this has never been used in CFS trace evidence reports because it is scientifically inaccurate. For the same reason, it should also be avoided in a court of law (as stated by Mr. Erickson in his testimony before the Inquiry).⁶⁹ With respect to the term "consistent with", although it does have a distinct scientific meaning in hair and fibre analysis and is regularly used among scientists, repeated use of the use of the term among non-scientists may create a mistaken impression if the meaning of the terms is not adequately emphasized.

Dr. Young testified that both terms have been eliminated from the CFS vocabulary in the context of subjective examinations like hair and fibre comparisons. This is a commendable development.

Recommendation 10: Specific language to be adopted

The previous recommendation addresses the avoidance of specific language which is potentially misleading. This recommendation encourages the use of specific language which enhances understanding.

Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item ‘may or may not’ have originated from a particular person

⁶⁹ The Centre also said that “[i]t is significant to note that the word ‘match’ was used regularly in its colloquial sense by parties at the Inquiry. The implication, clearly, is that the word may be used as a helpful shorthand without jeopardizing the mutual understanding that it is scientifically inaccurate. While this does not suggest that use of the word ‘match’ is advisable in Court, it does demonstrate that the word is not necessarily misleading.” This observation is a valid one. Indeed, I have used the term myself earlier in this chapter in connection with the Jackson and Cook study, since Mr. Cook and others used the term extensively, but with appropriate qualifications.

or object. This language is preferable to a statement that an item ‘could have’ originated from that person or object, not only because the limitations are clearer, but also because the same conclusion is expressed in more neutral terms.

Drs. Tilstone and Robertson testified that scientific language has historically been constructed from an inclusionary perspective. They suggested that it be reconstructed from an exclusionary perspective, so that scientists state their conclusions in terms of their ability to exclude rather than their ability to include. As noted earlier, the Centre has indicated in its written submissions that it “has been evolving toward the use of an exclusionary perspective, and intends now to require staff to write in exclusionary terms in appropriate cases.” I support this approach.

Dr. Tilstone also felt that scientists should state their conclusions in everyday language, avoiding terms that are not clearly defined. Dr. Robertson agreed, citing the following statement from the Splatt Commission in Australia:

The vital obligation which lies upon the testifying scientist is that they spell out to the jury in non-ambiguous and precisely clear terms the degree of weight, and substance, and significance which is or ought to be properly attached to the scientific tests, analysis, and examination as to which they dispose, and specifically, the nature and degree of any limitations.

I have earlier said that reports must reflect the limitations upon the scientists’ findings. Whether reflected in reports or in testimony, scientists must use language which clearly reflects these limitations. For this reason, terms like ‘could have come from a particular source,’ although they contemplate the opposite, should be rejected in favour of language which more explicitly highlights the full implications of a scientific finding. Dr. Tilstone suggested describing hair comparisons in terms like “I cannot exclude that these things had a common origin, but other explanations are possible.”

He said:

You should say: I have viewed the following tests, and I cannot exclude that these came from the same source.

But you're going to have to qualify it. if I wrote a report that said: On the basis of the tests which I've enumerate and I used, I cannot exclude that these things had a common origin, but other explanations are possible, then I have alerted you to the limitations of my findings, and given you an easy way to test the strength of it. And we can then engage in a dialogue where we try to work out what the strength is.

Recommendation 11: The scientific method

The 'scientific method' means that scientists are to work to vigorously challenge or disprove a hypothesis, rather than to prove one. Forensic scientists at the Centre should be instructed to adopt this approach, particularly in connection with a hypothesis that a suspect or accused is forensically linked to the crime.

The comments of author Judy Bourke again bear repeating:

Scientific testing 'should be a search for dissimilarities, not for similarities.' It is a scientific principle that tests be 'designed to disprove the original assumption' of the accused's guilt, that is, to exclude the suspect. The risk in testing for a pattern of similarities is that it implies the assumption of guilt is correct. This strengthens the implication of the common origin of crime scene samples to the suspect. The *Shannon Report* referred to this risk of heightened assumption and stronger implication as 'unconscious bias'.

Ordinarily, the hypothesis being tested (explicitly or implicitly) in the hair and fibre unit is whether the trace evidence connects the accused to the crime. In the *Morin* case, the hypothesis was, more specifically, that the trace evidence linked Christine Jessop to the Morin Honda or that the trace evidence linked Guy Paul Morin to the body site.

The submissions on behalf of the Morins dealt with this point:

Tilstone explained that in response to the *Splatt* Commission in Australia, there were a number of policies enacted to attempt to achieve both impartiality and independence in the newly established Forensic Science Services. Scientists are required 'to report in exclusionary terms' and 'findings should be interpreted

from the point of view of what they excluded, the things that were not possible as a result of these findings'. As regards non-exclusions, the limitations must be clearly stated. These requirements are in accordance with sound scientific principles, he said. Tilstone further testified:

Science since Newton has been a matter of postulating a hypothesis and testing it. ...the principal scientific ethic — and I think ethic is a good word for it — is that the testing has to be a rigorous challenge to the hypothesis, specifically designed to do everything possible to disprove it. And if you don't disprove it, then you're left with something that you accept for the time being.

Now that simple situation needs two further — well, one further qualification with two points to it, and that is that the strength of the belief that you're left with depends on firstly how common or uncommon the hypothesis is. And secondly, it depends on the strength of the scientific processes or procedures that you've used to challenge the hypothesis. So if we postulate a hypothesis of something that's everyday, and we test it by something that's everyday, then we're not going to disprove it. And really, we're not left with anything that's very compelling.

If, however, we challenge it with very discrimination techniques, and it fails to disprove it, then we are left with something that's compelling"

Drs. Robertson and Blake agreed. Blake testified:

I think that it is perfectly appropriate and arguably necessary for the forensic scientist to have some idea of the investigative theory. It is the investigative theory that is the hypothesis to be tested.

[A]nd the way that one goes about testing the hypothesis is, as Dr. Tilstone said yesterday, employing whatever appropriate procedures are available to disprove the hypothesis if it is wrong."

All of the scientists agreed that testing according to the investigative theory is valid and appropriate, but that the quality of the results achieved and their significance is dependent upon using every available legitimate scientific means to *disprove* the investigative theory. Tilstone summed this up concisely:

[W]e're distinguishing two very important things in this discussion. One is the quality of the hypothesis which is formulated and tested, and the other one is the quality of the procedures that are put in place to perform that testing.

Dr. Tilstone applied this approach to hair and fibre conclusions:

If you look at it in regard to your prompting about hairs and fibres, an example of an illustration that I've used in documents which we have, is that if a lab finds no differences in two sets of fibres, one recovered from person A, and the other recovered from person B, the conclusions that can be drawn from that can be extremely limited. And in particular, the question has to be posited: Is this fibre material there because of secondary transfer. In other words, did it come because both person A and person B had been in contact with some third common source?

And very often, the answer to that is, it depends on the numbers of recovered fibres, and people will say if you find a lot of fibres, it must have come from primary contact, and if you find very few, it must have come from secondary contact. And I think some people would use most. Now I don't believe that that's good science, because I don't know of any way you can challenge that hypothesis and say there is a certain number of fibres above which it's primary contact, and below which it must be secondary contact. And I'm using secondary contact deliberately rather than contamination. It could have been some kind of legitimate situation.

In my view, the submissions on behalf of the Morins (expressed in similar terms by AIDWYC) are sound. The scientists who testified during the systemic stage of the Inquiry supported this approach. Put succinctly, it serves to remind the forensic scientist that science bears the burden of demonstrating that reliable conclusions can be drawn from the available data. In the context

of the *Morin* case, a vigorous effort to challenge the hypothesis that the trace evidence connected Christine Jessop and Guy Paul Morin would, perhaps, have been more likely to yield the right result — namely, that the hypothesis cannot be shown or even favoured over other conclusions — than an approach which looked for evidence which tended to support the hypothesis that Christine Jessop and Guy Paul Morin were connected. This recommendation complements the suggestions earlier made that conclusions be reported, where possible, in exclusionary rather than inclusionary terms.

Recommendation 12: Policy respecting correction of misinterpreted forensic evidence

A forensic scientist may leave the witness stand concerned that his or her evidence is being misinterpreted or that a misperception has been left about the conclusions which can be drawn or the limitations upon those conclusions. An obligation should be placed on the expert to ensure that these concerns are communicated as soon as possible to Crown or defence counsel. Where communicated to Crown counsel, an immediate disclosure obligation is triggered. The Crown Policy Manual and the Centre's policies should be amended to reflect these obligations. The Centre's employees should be trained to adhere to this policy.

Several of the scientists who testified before me expressed concern that the adversarial system sometimes inhibited them from ensuring that their opinions were fully and accurately communicated and understood. Though I did not accept Ms. Nyznyk's evidence that this explains why her trial evidence was different from her Inquiry evidence, it is a legitimate concern. Mr. Cook indicated that there are occasions when experts may feel uncomfortable because the true strength or weakness of their evidence is not being conveyed to the court.

Similar concerns prompted the Runciman Commission to make the following recommendation:

Recommendation 298:

Where expert evidence is disputed, the trial judge should ask expert witnesses before they leave the witness box whether there is anything else that they wish to say. The question should be put in the absence of the jury but, if the evidence is admissible, it should

then be put before the jury.

Dr. Young testified that he had no difficulty with this recommendation. Messrs. Cook and Lucas similarly approved of it. Mr. Lucas and Sarah Welch, President of the Ontario Crown Attorneys' Association and a senior prosecutor, cautioned, however, that a biased scientist might use the opportunity to advocate a particular position. David Butt, an appellate Crown attorney with the Ministry of the Attorney General, suggested an alternative approach:

I don't think a mandatory requirement that at the end of any particular witness, a judge has to recite something in the nature of a Brydges' card: Is there anything else you wish to add, is necessarily going to be terribly helpful. What I do support is this: When one is presenting expert evidence, one is obviously, by the very nature of the evidence going before the jury dealing with something that's beyond the ability of the ordinary person to understand him or herself. The expert is there fulfil an educational need that's critical to the forensic process that the jury is engaged in.

The judge, in my view, should be watching the examination in-chief and the cross-examination with a very different eye than the parties are. They're advancing their — vigorously advancing their opposing perspectives on things. The judge should be looking at this from an educational perspective, and saying: Is the jury getting the information that they need? In other words, is the jury getting an accurate picture of the science here?

And if, for example, a judge feels, through observation, careful observation, careful listening, that an examination in-chief is perhaps too tightly controlled and perceives some frustration on the part of the expert, or in the cross-examination, again, the same kind of overly stringent control that the judge senses some frustration in the expert or some inability to get a point across that the judge perceives is critical, by all means, at the end of either — I would think at the end of the cross-examination is probably the best point.

But the judge should have, within the traditional limits of judicial questioning the opportunity to address the witness him or herself, and say: Now I sense that you

didn't quite say everything that you wanted to say in relation to area x, or in relation to area y. The science has to be given its full and legitimate strength if it's going to aid the truth-seeking process, and if the judge sense, during the course of its presentation in-chief or in cross, and I don't care who's calling the scientist, that that's not been done, the judge, I think, has a duty to step in and ask again, the context-specific questions that are going to fulfil that education objective.

Bruce Durno, a senior defence counsel and former President of the Criminal Lawyers' Association, preferred that the onus be on the testifying scientist:

While I appreciate Mr. Butt's comments about the trial judge's observations, scientists and expert witnesses are coming in to assist the trier of fact, who often is the judge, with an area outside of their field of expertise. It may very well be that the evidence has been presented in the wrong light because of questioning, and the judge may not realize it. So I'm very much in favour of having an onus on the scientist at the end, in the absence of the jury, to ask the questions. Is there a problem with the way in which your evidence has been presented, given the question?

Ms. Welch agreed that the obligation should fall upon the scientist.

The new Crown policy, largely reproduced earlier, does address this issue. The relevant portion bears repetition:

It is important to ensure that experts understand that, if at the end of their testimony they are concerned that a misleading impression of their evidence has been left with the triers of fact, they should relay that concern to the officer-in-charge as soon as possible. The information given to the officer by the scientist triggers an immediate disclosure obligation to the defence. Counsel should be aware that scientists from the Centre of Forensic Sciences are alive to this obligation.

Mr. Baig, an experienced, senior defence counsel, thought that scientists should report their concerns to Crown counsel and not the police. Mr. Griffiths, one of the architects of the policy, felt that the relationship

between a witness and the police, the prosecutor's time constraints and the concern that prosecutors not become witnesses at trial, explain the policy.

In its written submissions, the Criminal Lawyers' Association argued:

The policy directing that a scientist notify the officer-in-charge of the case if he/she feels his/her evidence has been misinterpreted is unacceptable. All parties including the defence should be so informed. The scientist, if truly objective, has an ethical obligation to inform the person affected by the misinterpretation. It was asserted that the employees of the Centre are completely accessible to the defence before trial. They are more than willing to discuss all aspects of their proposed evidence and its interpretation. If this is truly the case, they should be equally available to correct misunderstandings after giving evidence.

My views are as follows. First, I do not support the mandated questioning of each witness by the trial judge as he or she leaves the witness box. I agree with Mr. Butt that the trial judge always has the discretion to intervene where the testimony is confusing or the witness has obviously been cut off through an overly controlling approach. Otherwise, the onus should rest with the expert to correct testimony. Second, although the Crown Policy Manual is generally acceptable, it would be preferable that the expert, where practicable, rectify the matter through Crown counsel. In this situation, Crown counsel will likely be readily accessible. He or she will have to address the concerns in any event. In some cases, the officer-in-charge is not present. He or she may not fully appreciate the concerns being expressed, in the same way as Crown counsel will, having called the evidence. Crown counsel are often more fully conversant with the disclosure obligations flowing from the expert's concerns. Crown counsel can involve the officer-in-charge in any event and, in limited circumstances, may be compelled to do so: for example, where the expert makes an allegation that might realistically make the prosecutor a potential witness.

Recommendation 13: Policy respecting documentation of contacts with third parties

(a) The Centre of Forensic Sciences should establish a written policy requiring its analysts and technicians to record the substance of their contacts with police, prosecutors, defence counsel and non-Centre

experts. This policy should regulate the form, content, preservation and storage of such records. Where such records are referable to the work done on a criminal case, they must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

(b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

In the *Morin* case, inadequate records were kept by CFS employees of their contacts with police, prosecutors and defence counsel. Ms. Nyznyk's failure to record her communications with investigators is such an example. Ms. Nyznyk and Mr. Erickson also failed to record the substance of any conversations with Crown counsel, although they repeatedly met with Crown counsel and investigators prior to the second trial. The failure to record anything about those meetings obviously inhibited any accurate account by them at this Inquiry of what they told the prosecutors in those meetings. More important, it inhibited an informed evaluation of their evidence prior to and during the trial. For example, the defence alleged at trial that the fibre similarities could be explained by environmental contamination. There was conflicting evidence at trial bearing upon the extent of contact (that is, the opportunity for environmental contamination) between the Jessops and Morins. It is impossible to ascertain from the existing documentation precisely what Crown counsel told the CFS experts on this issue and, accordingly, it becomes that much more difficult to ascertain what underlying factual assumptions prompted their evidence that environmental contamination was unlikely. One should expect CFS experts to record the factual assumptions or hypotheticals which are provided them, together with a summary of their opinions expressed in conversations with prosecutors, investigators and defence counsel. The existence of such documentation would also facilitate the preparation of supplementary reports, if required.

Mr. Lucas supported the idea of scientists keeping a record of their contacts with outside parties. Mr. Cook testified that the Forensic Science Service requires that all information given to a scientist be recorded. Dr. Robertson testified that a similar policy is in effect at his laboratory in South Australia:

[A]s far as protocols go, yes, any conversation between a submitting officer and the person receiving the case or subsequent contact is recorded in the case file, and

that conversation took place. And if there's anything substantive to the conversation, as I say, the essence of it is captured on the case file, as far as the police officers themselves is concerned.

.....

[I]n the Australia Federal Police, we have a case submission, or case management system where the officers put in a quite volume ... of sometimes description of their involvement of the case. And what encourages them to do that is that, is that is in fact what's used to evaluate, if you like, their work load so that it encourages them to put quite a lot of information in, and we get copies of that, and that goes on file as well.

I was advised that CFS scientists are now required to record in a 'conversation log' all communications with police, Crown attorneys and defence counsel. This log is subject to disclosure. Dr. Young acknowledged that the CFS has been somewhat vague about how specific its content should be, but stated that, recently, scientists have been advised to include more detail. This requirement should be reflected in the Centre's written policies, together with a preamble which explains to the scientists, in terms similar to those which I have articulated above, the kinds of things which must be recorded and why.

Recommendation 14: Policy respecting documentation of work performed

(a) The Centre of Forensic Sciences should establish written policies regulating the content of records kept by analysts and technicians of the work done at the Centre. In the least, these policies must ensure that the records identify the precise work done, when it was done, by whom it was done and the identity of any others who assisted, or were present as observers when the work was performed. The policy should also regulate the retention period and location of these records. All records referable to the work done on a criminal case must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

(b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

In the *Morin* case, seriously inadequate records were kept of the work done on the file. Notes were unorganized. No cohesive way of recording data was apparent. It would be difficult for any scientist to reconstruct precisely what Ms. Nyznyk did and when she did it based upon her records. The records often failed to disclose who conducted tapings or vacuumings. Witnesses could not confidently tell me whether they were involved or not in various activities.

The Centre has acknowledged the problem. The written submissions on behalf of the CFS say this:

- Changes to documentation requirements since the mid-80's are intended to enable anyone reviewing the file to have, as much as possible, a complete picture of all work done. These changes include the following:
 - (a) Technicians are not only required to take extensive notes of their work, but these notes must now always be retained in the files. In contrast to the mid-80's, technicians are also now required to document continuity.
 - (b) The trace unit has adopted a new set of forms for work notes, the objective of which is to standardize and maximize the quality of the information recorded. The new forms are presently being utilized on a trial basis, pending feedback from the staff.
 - (c) Logs are now kept of all calibration and maintenance of instruments.

I support these changes. My recommendation is intended to complement those changes in several respects.

Recommendation 15: Documentation of Contamination

(a) Where in-house contamination is discovered or suspected by the Centre of Forensic Sciences, the contamination should be fully

investigated in a timely manner. The contamination and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the contamination may relate. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements.

(b) The Centre of Forensic Sciences should also reflect, in its written policies, the protocols to be followed by its employees to *prevent* the contamination of original evidence.

(c) The Centre of Forensic Sciences should ensure that its employees are regularly trained to comply with the policies reflected in this recommendation.

Contamination is a serious event in trace analysis, affecting the integrity of any findings. Any evidence of contamination must be recorded in order to allow for later independent review. In addition, the potential causes of contamination must be fully investigated. Contamination in a case may not be an isolated event. It may have affected other cases, or may do so in the future. Mr. Erickson and Ms. Nyznyk failed to properly investigate the contamination in Mr. Morin's case, and thus we can never know whether it affected any other cases, or indeed the Morin findings themselves.

The Centre's written submissions reflect the current safeguards said to protect against contamination:

The hair and fibre unit has been physically rebuilt in recent years and a variety of measures have been implemented with a specific view to minimizing the risk of contamination within the CFS. In their travels to other hair and fibre facilities during 1997, Dr. Prime (CFS Director) and Dr. Young found that existing CFS hair and fibre facilities and standards compared very favourably with those observed.

The physical facilities of the hair and fibre unit have been changed in the following manner:

- There are now two separate taping rooms
- The taping rooms are separate from other

examination rooms

- The physical design permits only minimum passage of personnel through taping rooms
- There is a completely new ventilation system

The procedures now in place to prevent contamination are the following:

- No trace examinations are conducted on items that have been examined in another section of the CFS (i.e. trace examinations are done first or not at all)
- Taping rooms are blocked off completely during the taping process
- Any person taping an item must also do a taping of their own clothes, which taping is to be kept with the other material from the case
- Only the person or persons doing the taping are permitted in the examination room
- Disposable lab coats are now used instead of cloth coats
- A different lab coat is used for each taping

In addition, as a general rule, students and any other untrained personnel are not allowed access to exhibit materials, and training materials now emphasize the issue of contamination.

These procedures should be in writing and provided to all Centre employees. Though these procedures are more stringent than those in existence during the Morin proceedings, one must observe that many were said to be in effect back then — for example, the use of laboratory coats. The evidence before me suggested that the policies were not always honoured by employees. I expect that the Centre's employees are now acutely aware of the dangers of contamination. However, ongoing, regular training must ensure that these employees remain vigilant in this regard well after this Inquiry has concluded.

Recommendation 16: Documentation of Lost Evidence

Where original evidence in the possession of the Centre of Forensic Sciences is lost, the loss should be fully investigated in a timely manner. The loss and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the original evidence relates. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements. In this context, original evidence extends to work notes, communication logs or other material which is subject to disclosure.

As indicated above, a number of items of evidence in Mr. Morin's case were lost at the CFS before the second trial: four hairs, some of Ms. Nyznyk's work notes and work sheets, two bones and all the 150-200 hair and fibre slides that were not made exhibits at the first trial (which included any slides made by Ms. Stefak in her 1985/1986 re-examination). The prosecution was not advised of these losses in a timely way.

As part of the funding provided to implement recommendations contained in the *Bernardo Investigation Review* (the Campbell Report),⁷⁰ the CFS will receive in 1998 a new computer system for tracking evidence within the CFS. Each item submitted to the CFS will be bar-coded, and certain data, including movement of an item from one person to another within the CFS, and the creation of sub-items (e.g. slides from fibre tapings), will be recorded in a computer file. For each case, the computer will be able to generate a list of the items submitted, and the status of that item within the CFS. The location of preserved evidence will be recorded in the system, as well as its disposition. I am satisfied that the loss of original evidence in this case will be addressed through the introduction of computerized tracking of original evidence and its location.

Recommendation 17: Reciprocal disclosure

Reciprocal disclosure of expert evidence should be established. The defence should be obliged to disclose to the Crown in a timely manner

⁷⁰ The relevance of the Campbell Report to the issues at this Inquiry is discussed later in this Report.

the names of any expert witnesses it intends to call as witnesses, along with an outline of the witnesses' evidence.

Subject to very limited exceptions, a criminal defendant in Canada is not currently subject to any disclosure obligations. The Crown, on the other hand, has broad disclosure obligations, which include the obligation to disclose all material it proposes to use at trial and all evidence which may assist the accused even if the Crown does not propose to adduce it: *R. v. Stinchcombe*.⁷¹ The important differences between the obligations of the Crown and the defence to disclose are said to be rooted (at least partly) in the different roles played by each. The defence assumes an entirely adversarial position towards the prosecution. The Crown has an overriding duty to ensure that justice is done.

Expert evidence is frequently technical and complex. Crown attorneys understandably often require the assistance of other experts in order to properly respond to expert evidence called by the defence. The tendering of previously undisclosed expert evidence can lead to undesirable delays in trials. Dr. Young lamented the "mad scramble" that occurs once the Crown at a trial learns what the defence expert has to say. He testified:

I don't think that makes for good justice, when things are being done on the fly, and they are being done without proper planning or discussion. If we're to assume that science is impartial, then there's no reason not to discuss, and in advance, to in fact know what's going to happen.

Some of the witnesses also commented on the unfairness involved in allowing the defence to hide its expert evidence from the Crown. Dr. Blake, for example, thought that it unfair for the defence to obtain a different opinion concerning the "fundamental analytical information associated with the evidence in a case" and then sit on it, waiting to ambush the other side at trial. He suggested that this undermines public confidence in the legal process.

The Ontario Crown Attorneys' Association and the CFS have recommended that reciprocal disclosure of expert evidence be established for

⁷¹ (1992), 68 C.C.C. (3d) 1 (S.C.C.).

criminal proceedings. In my view, mandated disclosure by the defence of expert evidence should be legislated. I should be clear that there are compelling policy reasons why reciprocal disclosure (pertaining, for example, to non-expert evidence) should not be mandated generally. That broader issue is not raised before me and, accordingly, is not further addressed.

As well, reciprocal disclosure of expert evidence should be mandated only for evidence which the defence intends to call at trial. A rule which would extend to the disclosure of any expert evidence available to the defence (but which the defence does not intend to lead) may be superficially attractive. However, defence counsel serves his or her client in an adversarial setting. The compelled disclosure of harmful expert opinions to the Crown would undermine the solicitor-client relationship and, equally important, inhibit defence counsel in investigating the forensic issues at trial. If defence counsel knew that the results of their forensic investigation need be disclosed to the Crown, it is likely that they would frequently forego such investigation due to the uncertainty of the results and out of fear that they could thereby fortify the case against the defendant. It is my view that disclosure of expert evidence which the defence intends to tender strikes the appropriate balance.

Such a recommendation was supported by the scientists who testified during the systemic phase. This is not surprising, since they understand the adversarial system, but regard their role as non-adversarial. Reciprocal disclosure enables scientists called by both sides to fully evaluate the scientific findings to be tendered at trial. Not surprisingly, perhaps, the recommendation was overwhelming supported by the prosecutors who responded to a survey circulated at the instance of the Ontario Crown Attorneys' Association (and supported by the Association itself). In my view, there are no constitutional or legal impediments to reciprocal disclosure of expert evidence, and compelling policy reasons in its favour.

The Runciman Report supported a system of reciprocal disclosure. However, its recommendations extended far beyond the more modest proposal I have made. Viscount Runciman's recommendations 287-292 read:

287. There should be pre-trial discussion between the two sides, not necessarily by way of a hearing, in all cases in which scientific evidence is being led, whether by the prosecution or by the defence.
288. If the defence intend to dispute the prosecution's

scientific or other expert evidence, they should give advance notice of the grounds on which they dispute that evidence, whether or not they intend to call expert evidence of their own.

289. Where the defence are calling their own expert evidence, the expert witnesses on both sides should be required to meet in order to draw up a report of the scientific facts and their interpretation by both sides. The document should be available to be put to the court as a written account of what has been agreed or remains in dispute. Where substantial disagreement on the scientific evidence is recorded in the report, a preparatory hearing should normally be arranged.
290. Where the defence do not dispute the prosecution scientific evidence, they should indicate this when counsel for both sides certify that they have discussed the case between them and notify the agreement, or lack of it, that they have reached on the issues.
291. Where the defence intend to dispute the evidence but not call expert evidence they should, after disclosure of the prosecution's expert evidence, indicate which matters in that evidence are admitted, which are not admitted, and when they are not admitted, in which respects.
292. Where the prosecution are not proposing to lead any expert evidence but the defence wish to call such evidence, the prosecution should be under the same obligations as the defence would be in the reverse situation.

Dr. Young felt that discussion of the scientific issues in advance of trial leads to better science. Otherwise, a scientist may go to court and learn something from the defence that would have altered his original evidence. He also suggested that reciprocal disclosure would help eliminate the issue of systemic bias:

I think it takes us out of the adversarial system, and it puts us where we should be as experts. Discussing with other experts and agreeing that honest disagreements can take place. So that I believe you tone down the problems and eliminate a lot of the risks with that move. And I realize it's a bold move, but I think it's

one that, if we're serious about bias, it would go a long way in helping everybody.

And I think the relationships between the defence Bar and the scientists, if there are problems, would improve with that kind of a relationship where in fact, there was just a full and frank discussion ahead of time about what does the science mean, and we were cast in a much more neutral role. We don't enjoy the adversarial role.

Much has been written about the nature and scope of reciprocal disclosure. A variety of reciprocal disclosure regimes exist throughout the world, some extending to defence evidence generally. This Inquiry devoted very little time to the issue and virtually no time to the recommendations contained in the Runciman Report, which, if implemented in Canada, would represent a fundamental change to the criminal justice system. In my view, reciprocal disclosure, to the degree proposed by me, would complement the present justice system. The merits of more extended changes in this area are beyond the scope of this Inquiry.

Recommendation 18: Joint education on forensic issues

The Centre of Forensic Sciences, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Ministry of the Attorney General should establish some joint educational programming on forensic issues to enhance understanding of the forensic issues and better communication, liaison and understanding between the parties. The Government of Ontario should provide funding assistance to enable this programming.

The substance of this recommendation was supported by a number of parties at this Inquiry. There is an obvious need for Crown and defence counsel to be better educated on forensic issues.

Mr. Lucas testified that the CFS has repeatedly received demands from both the Crown and the defence bar for more training on forensic issues. At the same time, he acknowledged that the CFS has not always been able to meet those demands because of its limited resources and available personnel. The backlog of case work has always been a very significant issue in any decision on the use of staffing.

Dr. Young testified that the CFS recognizes the need for greater education in forensic issues. He added that the Centre is currently taking steps to address the problem. It is considering how it could fund a forensic course at Crown school, and is beginning to develop training programs and seminars for the defence. Dr. Young pointed out, however, that training programs require funding and take away from the time forensic scientists have to conduct the ever-increasing amount of case work. This is one reason that the Ontario government need provide adequate funding for educational programs. I more fully address resource issues later in this Report.

However, joint programming is intended to address another issue. There is an obvious need for forensic scientists at the Centre to be better educated on the respective roles of Crown and defence counsel, and the criminal justice system. Joint programming must involve the Centre's scientists, sometimes as *lecturers* and sometimes as *registrants*. The Centre needs to foster a culture of independence and impartiality. Several scientists spoke to this issue at the Inquiry. Roger Cook described this culture as something that has "grown up" with his organization, the Forensic Science Service in England, and "is held as being extremely important." This culture permits scientists to "look at both sides, and draw conclusions, which may well help the defence in one case, the prosecution in another, or neither in another." This culture does not inhibit a scientist from saying things out of concern that they may harm the prosecution's case. Dr. Tilstone described the importance of dialogue as also fostering the perception of independence and impartiality:

A. It's absolutely natural that a situation where the forensic science services are delivered from an organisation that's doing all or almost all of its work on the instructions of the police or the prosecuting authorities would have that image in the mind of the defence Bar.

And correcting the image really requires a dialogue between the defence Bar and the laboratory to see if they can develop jointly some agreed way that things are done that helps to address the image. So therefore, when it breaks down, that really just becomes an extreme example of the generic situation.

Q. So the solution for both situations is essentially to talk?

A. It's absolutely to talk. It's a dialogue, it's an understanding, it's a: What can we give, as opposed to: What can we take in the sense of working together to address the issue? But really, it if breaks down in the way that you have described, it's going to be impossible to resolve unilaterally. There is nothing I can see that the lab could do in a unilateral sense that would address the breakdown in confidence, because it's a question of trust. It's not a question of anything that's necessarily objective and procedural, and therefore capable of one-sided correction.

It follows that joint programming can reduce barriers and enhance understanding and trust between the parties. It also follows that this recommendation should not be seen as inhibiting joint programming between only some of the relevant parties: for example, a program involving the Centre of Forensic Sciences and the Criminal Lawyers' Association (whose level of mistrust is at its highest) may specifically address defence-related issues.

Finally, I wish to add that the development of training programs and seminars by the Centre for the defence should directly involve input from the defence bar at the earliest opportunity. A concern raised at this Inquiry by the Criminal Lawyers' Association in the context of various suggestions by Dr. Young was that the defence has had little or no input in proposed policies which directly relate to the defence bar. Whether through defence participation in the recommended advisory board (discussed below) or through organizations such as the Criminal Lawyers' Association (or as I suggest, through both), the CFS should directly involve the defence bar in a number of the issues raised here.

Recommendation 19: Creation of an Advisory Board to the Centre of Forensic Sciences

An advisory board to the Centre of Forensic Sciences should be established consisting of Crown and defence counsel, police, judiciary, scientists and laypersons. It should be created by statute.

Several parties before the Commission, including the CFS itself, recommended that an advisory board to the Centre be established. AIDWYC has suggested that such a board could provide independent and external

advice to the CFS, and ensure meaningful communication between the Centre and other stakeholders in the criminal justice system. The CFS suggested that a board could provide a mechanism for ongoing suggestions and feedback in relation to CFS policies and performance.

I adopt this recommendation. The existence of an advisory board with broad-based representation would also promote impartiality, both in appearance and reality.

The real issue here is the precise role of such an advisory board.

Dr. Young described the type of advisory board currently under consideration by the CFS:

What has arisen is an advisory board that functions on a lab-by-lab basis, so it's a local advisory board made up of local judiciary, defence counsel, Crown attorneys, scientists, coroners, and they meet on a regular basis and discuss issues such as new policy, and they have the chance to comment on it. They comment on performance of the lab, any new ideas, any new things that should happen. And they're finding that extremely useful and extremely successful. Illinois have basically patterned a model the same way, and again, speak very highly of it.

So it's our intention, in fact, to look at this model and to implement it. We think it increases the chances of meaningful communication and not going too far off the mark in the management of the lab.

Q. Now who would be on the advisory — who do you anticipate? I appreciate it's in the planning stage, but who do you anticipate would be on the advisory board?

A. The groups I had mentioned, including defence Bar and judiciary, coroners, pathologists, the stakeholder group, the users of the service who all have a role to play in the actual policy and operation of the lab.

Q. All right.

A. But we don't see it as being a body — they won't actually establish all of the policy, but they'll be there

to advise on it.

In its written submissions, the Centre elaborated. It envisages an advisory board, meeting regularly to discuss and comment on policies and performance and providing advice and feedback to the Centre's management and to the Ministry. It would not be a decision-making or policy-making body.

Other parties suggested that the advisory board play a far more prominent role at the Centre. Such a board, it is contended, should establish policy and effectively operate as the Centre's board of directors, with the Director reporting to it. The concern which actuates this suggestion is that an advisory board which has no real power to compel policy or practices may be completely ineffective. The Canadian Bar Association — Ontario sees the advisory board as the Centre's interim Board of Directors, pending the reconstitution of the Centre as an independent agency.

In my view, the appropriate solution lies in between. The advisory board should be a statutory creature. Its composition and mandate should be regulated by statute. It should have its own budget, which is not dependent upon the Centre's own operational needs. Its meetings should be regular. The Director of the Centre should attend its meetings and report to it. Existing and proposed policies and practices should be reviewed with the board. New policies should only be implemented after the fullest discussion at the board. The board should not be a decision-making or policy-making body. However, the board should report annually or semi-annually to the government. The report should be public, and would include the board's position on policies and practices adopted by the Centre. This ensures that the day-to-day operations are run by the Centre's Director and staff, that the Director remain accountable to the government, but that the Centre and the government remain publicly accountable for the Centre's policies and practices. The board should also exist as a vehicle through which prosecutors, defence counsel and members of the judiciary can raise concerns about the Centre.

In my view, the establishment of such an advisory board need not await its statutory creation. Indeed, there are compelling reasons why it should be constituted *now*.

Recommendation 20: Quality Assurance Unit

- (a) The recent establishment of a quality assurance unit by the Centre is to be commended. The unit's staffing and mandate should be reflected in written policies. Dedicated funds should be allocated to the quality assurance unit, adequate to implement this recommendation. The unit's budget should be insulated from erosion for operational use elsewhere.**
- (b) The unit should consist of at least seven full time members. The Centre should be encouraged to hire at least half of the unit's members from outside the Centre. At least one member of the unit should have training in biology.**
- (c) The unit should include a training officer, responsible for internal and external training.**
- (d) The unit should include a standards officer, responsible for writing, or overseeing the writing of policies.**

Dr. Young testified that a separate quality assurance unit was recently established at the CFS. A quality assurance manager has been appointed. Her duties include watching for ASCLD compliance on a regular basis, finding and distributing proficiency tests, and following up on their results. It is contemplated that six additional persons will be added to the unit in the future (most likely from within the ranks of the CFS). One will work directly with the manager, and three others will work directly with the individual sections. In addition, there will be a standards officer, who writes and develops policies, and a training officer, who is in charge of overall training, both internal and external. Dr. Young testified that the government has accepted the need for *five* full time quality assurance people, and has committed to funding them on a permanent basis.

My recommendations largely track those proposed by Dr. Young and the Centre. However, I think it important that a quality assurance unit not draw exclusively upon employees at the Centre. Outside hiring promotes new ideas, and an objectivity in approach. In my view, at least three members of the unit, unless completely impracticable, should be hired from outside the Centre.

Recommendation 21: Protocols respecting complaints to the Centre of Forensic Sciences

- (a) In consultation with the advisory board, the Centre should establish, through written protocols, a mechanism to respond to, investigate and act upon complaints or concerns expressed by the judiciary, Crown and defence counsel, or police officers. The protocols should identify the person(s) to whom a complaint or concern should be directed, how it should be investigated and by whom, to whom the results should be reported and what actions are available to the Centre at the conclusion of the process.
- (b) Trial and appellate judges should be encouraged by the Centre, through correspondence directed to the Chief Justice of Ontario, the Chief Justice of the Ontario Court of Justice (General Division), and the Chief Judge of the Ontario Court of Justice (Provincial Division) to draw to the Director's attention, in writing, any concerns about testimony given by the Centre's scientists. Judges should be encouraged by the Centre to identify judgments, rulings or comments made by the Court in instructing the jury which are relevant in this regard. Transcripts should generally be obtained by the Centre of the relevant judicial comments, together with the witness' testimony.
- (c) The Crown Policy Manual should be amended to provide that Crown counsel should draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre. This policy should be encouraged through correspondence directed to the Ontario Crown Attorneys' Association.
- (d) The private bar should be encouraged by the Centre, through correspondence directed to relevant organizations, including the Criminal Lawyers' Association and the Canadian Bar Association — Ontario, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.
- (e) Police officers should be encouraged by the Centre, through correspondence directed to relevant police forces, or through the Ministry of the Solicitor General, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be

investigated by the Centre.

Dr. Young and Mr. Lucas both testified that there is no formal mechanism in place for the CFS to obtain feedback about the conduct of its employees, particularly about their testimony in court. Usually, such feedback is obtained by word of mouth or in casual conversation. When the CFS does receive feedback, it is usually in the form of positive comments. Dr. Tilstone explained that there is nothing in the ASCLD by-laws which speaks to complaints. If, for example, a scientist's bias is commented on in a trial judge's reasons for judgment or in his or her charge to a jury, there is no procedure in place to ensure that this is brought to the Centre's attention.⁷²

Dr. Young testified that it is very important to get negative feedback. The CFS would like to be notified of any concerns expressed by judges or Crown attorneys over the alleged bias or unreliability of its scientists. Dr. Blake testified that being receptive to complaints, and dealing with them appropriately, will help avoid mistrust of a laboratory by the defence, and any perception of bias. Dr. Robertson welcomed the idea that Crown counsel be directed to bring any adverse finding made by a trial judge to the laboratory director's attention.

The idea of court cards was raised at the Inquiry by Dr. Young. Court cards are essentially evaluation forms which can be given to the parties in a case, and perhaps even the presiding judge after a trial, so that they can record their views on the conduct of any forensic scientists who testified in the case. Whether through this or another mechanism, Dr. Young supported the idea of inviting judges and requiring prosecutors to convey their concerns to the CFS. Dr. Robertson agreed that it would be helpful if prosecutors were instructed to do this. Dr. Tilstone expressed concerns about such evaluation forms. He suggested that trial counsel may be affected by the adversarial process, and would not be competent to comment on issues such as whether the expert strayed beyond the realm of his or her expertise. He believed that there is nothing better than another expert monitoring the scientist's testimony.

After this testimony was completed, the CFS initiated a six-month

⁷² During the Inquiry, I declined to permit cross-examination on allegations of bias at the Centre arising in other cases and in respect of scientists not testifying at this Inquiry. The relevant complaints or concerns should be directed to the Centre for investigation.

pilot project in early 1998 to obtain feedback from counsel regarding the testimony of CFS scientists in criminal and civil trials. The CFS will send a one page questionnaire to the Crown attorney and defence counsel involved in every trial at which a CFS scientist has testified. Counsel are encouraged to fill out the questionnaire and return it to the Quality Assurance Manager. The Manager will provide a copy of the responses to the testifying scientist and his or her supervisor, and discuss any points raised therein with the scientist. The questionnaire asks the following five questions:

1. Was the testimony presented in a professional and clear manner?
2. Was the testimony presented objectively?
3. Was the testimony credible, relevant and understandable?
4. Did the witness convey a thorough knowledge of the discipline?
5. Additional comments. Use an extra page if necessary.

In my view, this pilot project is commendable. It will assist the Centre, in consultation with its advisory board, in structuring a long-term mechanism for complaints or concerns. I share Dr. Tilstone's concern that the advocate who tendered the scientist as a witness may be less likely to reflect upon that witness' testimony in any meaningful way. That is why all participants in the justice system, including the judiciary, should be encouraged to voice any concerns. That is also why this complaint mechanism is not a substitute for the monitoring of scientists' testimony by other scientists. It provides another vehicle to assist in bringing potential problems to the Centre's attention.

The Morins submit that the confidentiality of ASCLD reviews prevents the public and professionals in the legal system from accessing documentation of instances of poor performance by a scientist. One issue which the Centre and its advisory board must wrestle with is the extent to which the results of any complaint process should be accessible and, if so, how should such results be made available to counsel who wish to know if a scientist has, for example, previously overstated evidence. An overly 'transparent' complaint process may inhibit the initiation of complaints (or

just ‘concerns’) and performance improvement. An inaccessible process may invite repetition in future cases.

Recommendation 22: Post-Trial Conferencing

The Centre of Forensic Sciences should establish a case conferencing process to assist in evaluating performance.

Dr. Young supported the creation of formalized case conferences to follow the completion of court cases in which the testimony of the CFS expert was seriously disputed. Such case conferences would discuss the testimony given: Did it go too far? What could have been done better? Such a conference would parallel similar conferences conducted in other disciplines — for example, the medical post-mortem conference. Dr. Young envisages that the Centre’s training officer would organize such conferences. I fully endorse this proposal.

Recommendation 23: Audits of the Centre of Forensic Sciences

As I have reflected, the CFS was accredited by the American Society of Crime Lab Directors (ASCLD) in 1993. As a condition of accreditation, it is required to conduct an internal audit of its operations every year. In addition, it is required to submit to an ASCLD inspection every five years. The ASCLD inspection is designed to ensure that the Centre continues to comply with accreditation requirements. The next ASCLD inspection will take place this year.

Internal audits are important tools to monitor and improve operations of the Centre, including quality control, and are intended to ensure compliance with CFS internal standards and accreditation requirements. They are also designed to uncover and remedy deficiencies. External audits add an important element of independence. They can also ensure that the CFS remains current in terms of its policies, procedures and equipment. The ASCLD inspections are specifically directed to compliance with accreditation requirements.

Mr. Cook testified that as a result of the Runciman Report, his laboratory is subjected to external audits every year. Dr. Tilstone testified that the National Institute of Science and Technology in the United States is developing a new accreditation program which will combine the best of all

the current programs. When the new program is put in place, accreditation inspections will take place every two years.

The adequacy of the present internal and external auditing regime was the subject of considerable evidence and submissions at this Inquiry. A variety of alternatives were proposed to me.

AIDWYC has suggested that within 12 to 24 months, the Centre be audited by an international team composed of experts in forensic science, laboratory practice and management. This should be a management and operational audit. Conclusions should be measured against 'best laboratory practice' and the goals identified by Dr. Young. The audit results should be publicly available. AIDWYC's submissions, in support of this proposal, state as follows:

The Inquiry has provided an important stimuli [sic] for change within the Centre. However, this spotlight will dim and the public, as well as the stakeholders in the system, have every right to know how well the Centre has done in making the changes identified by Dr. Young and how consistently the Centre scientists produce high quality laboratory work and effectively communicate the results of their scientific work to those who rely on it. For example, Dr. Young testified that the Centre has instituted a policy requiring a second opinion by a different scientist, when comparisons are made which necessarily include an element of subjectivity on the part of the examiner. This policy is inherently problematic as the second examiner is being asked to agree or disagree and is therefore aware of opinion of the first examiner. Dr. Young appreciated the limitations of this kind of check on an examiner's work and testified that, in addition, the Centre intended to introduce some "re-testing" in all areas of the laboratory's activity. This will involve handing over a case and having all the work re-done. Such a programme, if introduced on a sufficiently wide basis, will be an important component of internal laboratory proficiency testing. However, too little has been done to evaluate the success of this measure.

The Centre of Forensic Sciences disagreed with the proposal:

During the Inquiry it was suggested that public

confidence in the competence of CFS staff needed to be restored, and that to that end an international audit of the CFS should be conducted within the next year. It was further suggested that the audit process be public. While the CFS understands the motivation for these suggestions, it is submitted that for practical reasons the Commissioner should not accept them. An ASCLD/LAB accreditation inspection is scheduled to take place at the CFS in 1998. The time and effort spent in preparing for this exercise is considerable, and would have to be duplicated if another audit were conducted. Casework would certainly suffer if resources continue to be diverted to a further audit process.

Further, the ASCLD/LAB inspection process is intensive and includes a review of many files within the CFS, including past work, as well as observation of scientists at work. The inspectors are part of a small community of international specialists trained in forensic lab inspection. It is submitted, therefore, that this process is effectively an international audit and is sufficient to ensure that the science being performed at the CFS meets all accepted international standards.

With respect to whether the results of an audit, or the ASCLD/LAB process, should be public, it is submitted that this would be counter-productive. While the CFS recognizes that transparency has some benefits, it is submitted that it has disadvantages as well, and that on balance it is preferable to release publicly only the status of accreditation, along with the grades received upon accreditation. The CFS favours confidentiality for two reasons: First, public documents relating to quality assurance would inevitably become the subject of debate in criminal proceedings, adding time and expense to criminal litigation, with marginal benefit. Second, the rigour of quality assurance processes would inevitably be compromised by the spectre of public criticism. This detracts from one of the most important benefits of the quality assurance program, which is its effectiveness as a *bona fides* learning exercise. It is therefore submitted that beyond the status of accreditation and the accompanying grades, any other documentation must be confidential, subject only to what may be accessible under Ontario's Freedom of Information legislation.

The Centre revisited this issue in later submissions:

In its Recommendation 37 AIDWYC suggests that the CFS should be audited by an international team within the next 12 to 24 months. This is precisely what will occur during 1998 when the CFS is inspected by ASCLD/LAB for renewal of its accreditation. As demonstrated in its earlier submissions, the CFS intends to adopt policies in line with the practices suggested by the experts before the Inquiry, and therefore to meet the "best practice" standard suggested by AIDWYC. The accreditation process will determine whether the CFS is complying with its own policies.

Notably, as stated by Dr. Tilstone in his testimony, the ASCLD/LAB program will soon be merging with ISO. When this the case, accreditation will take place every two years.

Dr. Young demonstrated, in his testimony, an obvious desire to make the CFS the best possible forensic institution. In this Report, I have endorsed many of the proposals which he put forward on behalf of the Centre. He, in turn, accepted in principle several suggestions for improvement put to him by Commission counsel. He was also impressed with the suggestions which came from the panel of forensic scientists who testified during the systemic phase, and he promised that those suggestions, not already adopted, would be seriously considered, together with my recommendations. I accept his good faith in this regard. I am also mindful of the Centre's justifiable concerns that the audit process not become so intrusive and time-consuming that its scientists cannot do their work.

However, having said that, AIDWYC, the Criminal Lawyers' Association and the Morins have raised significant concerns which I can recast in these terms. First, this Inquiry cannot evaluate the extent to which the proposals put to Dr. Young (and even accepted by him) will, in reality, be implemented and, even if implemented, done so in the most effective way. Second, the Centre has demonstrated a 'defensiveness' about its own failings — indeed, it is alleged that the Centre still does not appreciate the depth of these failings. Third, the Centre may be less motivated to make fundamental change once the glare of a public Inquiry has dissipated. Fourth, the accreditation process does not directly (or in the most effective way) address the most significant failings identified at this Inquiry — the culture of

independence and impartiality, the form and content of reports, the overstatement of evidence in individual cases. A standardized accreditation inspection fails to meet the needs identified by this Inquiry. Fifth, there is a 'crisis of confidence' in the Centre. These legitimate concerns appear to motivate the suggestion, certainly by AIDWYC, that a full, independent, internationally based audit must be conducted to restore public confidence in the institution and ensure meaningful change.

I am reluctant to recommend that an additional full-scale management and operational audit, conducted by a newly constituted international team, be superimposed upon the existing external and internal audit process. In my view, a more focussed and limited recommendation would meet the legitimate concerns raised here.

(a) The Centre of Forensic Sciences should, in consultation with its advisory board, engage an independent forensic scientist (or scientists) no later than October 1, 1998, to specifically evaluate the extent to which the failings identified by this Inquiry have been addressed and rectified by the Centre. The scientist's (or scientists') final report should be made public.

Dr. Young was concerned by the prospect of 'public' audits. He believes that transparency would inhibit the free discussion of problems within the CFS. He also feared that the results of audits could be misused in court. The specific and focussed evaluation which I recommend does not, in my view, raise these issues.

(b) The Centre of Forensic Sciences should support the movement to re-accreditation every two, rather than five, years.

The Morins have also suggested that an external audit be done of the biology section and its work for the last 10 years in seriously contested cases. In particular, they recommend that the audit embrace the work of the serology section. They further recommend that a report prepared on September 19, 1997, by Dr. Margaret Kuo be referred to an advisory panel for a discussion of appropriate methods of follow-up, with a report issued by the panel by September 30, 1998.

Dr. Kuo's report was prepared pursuant to a request by the CFS for an independent assessment of the performance of its serology unit in the late

1980's and early 1990's. In brief, Dr. Kuo found that the unit performed satisfactorily in the 1980's, but experienced severe personnel shortages in the 1990's, leading to a backlog of work and reliance on a difficult and inconsistent test method.⁷³

I did not permit cross-examination of Dr. Young based upon Dr. Kuo's serology report, since its connection to the issues in this case was somewhat tenuous and given my interpretation of my mandate. Accordingly, I do not intend to make recommendations relating to the appropriateness of auditing the serology work done by the Centre: not because I think the suggestion does or does not have merit; it simply exceeds the proper scope of my mandate.

Recommendation 24: Monitoring of Courtroom Testimony

The Centre of Forensic Sciences should more regularly monitor the courtroom testimony given by its employees. Monitoring should, where practicable, be done through personal attendance by peers or supervisors. Monitoring should exceed the minimum accreditation requirements. All scientists, regardless of seniority, should be monitored. Any concerns should be promptly taken up with the testifying scientist. The monitoring scientist should be instructed that any observed overstatement or misstatement of evidence triggers an immediate obligation to advise the appropriate trial counsel.

Dr. Tilstone testified that the accreditation requirement for the monitoring of courtroom testimony is fulfilled at the Forensic Science Service in South Australia through having peers and supervisors attend court to evaluate the analyst's testimony:

The ASCLD LAB standard, which is an essential one, is that testimony is monitored, everyone's testimony is monitored at least once a year. It does not mandate the manner in which it is done. Now in my opening presentation this morning, I described how I asked that be done in Adelaide. It was a matter of internal policy, or internal preference, perhaps would be more accurate,

⁷³ Dr. Kuo also stated that as the CFS was inspected and accredited in 1993, it might be inferred that ASCLD/LAB inspectors were satisfied with the quality of the work during the early 1990s.

but it was done by a peer or a supervisor being present.

But the ASCLD LAB program allows it to be done, for example, by simply taking a card, and handing that to the instructing attorney, and asking the attorney to complete it and return it.

.....

Some feedback is better than none, but the feedback that you are going to get from the card system is always going to be imperfect, and it's not even just the question of perhaps coloured by feelings at the time it was completed. It's what you can ask on the card and the quality of the responses you can get. Part of what I was seeking from the feedback is how technically competent were the answers? Was this witness staying within her realms of expertise or straying beyond them? Were the responses that were given complete, and fair, and balanced?

And it takes a scientist who knows the area to give that, and there is no way that an attorney can give a good response to that sort of situation.

Mr. Lucas testified that it is desirable that the scientist's section head attend Court, observe the scientist's testimony (at least once a year) and prepare a report on it. Mr. Lucas explained that sometimes a scientist will not testify in a given year. Alternatively, if a scientist does testify, it may only be in a remote region of the province, where it is difficult to have another expert attend. Dr. Young added that live monitoring of testimony causes problems because it removes someone from the laboratory who would otherwise be working on other active cases. But Dr. Young accepted that without adequate monitoring one cannot ensure that every CFS scientist is testifying in an objective manner.

The evidence clearly established that personal attendance for courtroom testimony is the preferable type of monitoring. Unlike the reading of transcripts, the monitor can evaluate the manner of presentation of the witness, observe the impact of the evidence, and provide instant feedback during the currency of the case. In my view, it is a critically important aspect of quality control — assuming that the monitor is alive to the failings identified at this Inquiry. Several witnesses noted that most problems with forensic scientists do not relate to their laboratory skills, but rather to the

fairness and accuracy of their findings, as communicated to the court.

Ideally, the monitor should be the witness' supervisor or, if impracticable, a scientist knowledgeable in the discipline. The Quality Assurance Unit at the CFS should organize the monitoring and be responsive to problems which are identified.

Review of transcripts should not be substituted for in-person monitoring of testimony. Although such a review will be a desirable supplement in a number of cases, and the only option available in others, it does not offer as effective a means of scrutinizing the true impact of an expert's testimony.⁷⁴

Live monitoring involves continuing resource issues. These are addressed later in this Report.

Recommendation 25: Training of Centre of Forensic Sciences employees

The Centre of Forensic Sciences' training program should be broadened to include, in addition to mentoring components, formalized, ongoing programs to educate staff on a full range of issues: scientific methodology, continuity, note keeping, scientific developments, testimonial matters, independence and impartiality, report writing, the use of language, the scope and limitations upon findings, and ethics. This can only come with the appropriate allocation of funding dedicated to training.

Dr. Young testified that the CFS plans to establish a full time training officer, hopes to strengthen the independence component of its training programs, and would like to engage in external as well as internal training. I endorse these plans. It was also clear to me that an adequate, on-going training program requires the allocation of dedicated funding by government.

Recommendation 26: Proficiency testing

The Centre of Forensic Sciences should increase proficiency testing of its

⁷⁴ One effective use of transcripts may involve a review of the testimony of any scientist tendered by the opposing party to challenge the Centre's expert. If the reviewer agreed with the other scientist, an obligation of disclosure would be triggered.

scientists. Efforts should be made to increase the use of blind and external proficiency testing for analysts. Proficiency testing should evaluate not only technical skills, but interpretive skills.

ASCLD accreditation currently requires that each analyst be subjected to one annual proficiency test, which may be internal. ASCLD also requires that an external test be conducted in every area of operation each year. Dr. Tilstone explained, however, that each area of operation encompasses a number of sub-disciplines. Thus, for example, hair analysis is a sub-discipline of a larger category. As such, there is no requirement that each hair analyst submit to an external proficiency test every year. Dr. Tilstone added that the ASCLD guidelines indicate that each sub-discipline should be tested, but they do not demarcate the sub-disciplines. As such, he felt that the guidelines would probably be satisfied if one sub-discipline was externally tested, and the others internally tested.

Dr. Young acknowledged that the CFS has not always been able to obtain external tests for every forensic sub-discipline. Whenever it cannot, it devises an internal test for the relevant scientists:

There are areas then, where our — in one year for example, the trace evidence might have a paint or fibre case, but not a glass, or vice-versa. We would then internally create a test and test our people internally in the areas that aren't available externally. So in fact, the ASCLD requirement is that someone in a section be tested once a year, and we ensure that, but we ensure that if they aren't tested externally, that everyone else is tested internally on a yearly basis. So each person receives some form of a proficiency test during the course of a year.

Mr. Lucas testified that external proficiency tests for hair analysis have not been available since the 1980s. I recommend that the CFS investigate all avenues for obtaining external proficiency tests generally and for hair and fibre analysts in particular. Not only do such tests allow for outside independent scrutiny of CFS results, but they allow the CFS to properly assess the performance of its analysts. Mr. Lucas testified that an important benefit of having the same material examined by a number of different laboratories is that "you find out what the state of the art is with that particular kind of sample, and so you have something to judge the results of

an individual by.”

Efforts should also be made to increase the use of blind proficiency tests, that is, tests which are disguised as regular case submissions so that the examiner does not know he or she is being tested. Mr. Lucas testified that blind testing is a more objective and ultimately preferable method of testing. Dr. Young said that blind testing can detect bias as well as bad science.

The evidence disclosed that there are difficulties with blind proficiency testing. Mr. Lucas testified that the CFS tried blind testing several years ago, and the examiners always figured out that they were tests and not real cases. He also stated that it is difficult to produce identical ‘fake’ cases for several different laboratories, yet it is important for a range of laboratories to participate so that a norm for the case can be established. Dr. Robertson testified that blind testing can be expensive, time-consuming, and difficult in the context of hair examinations which involve comparisons of patterns and not a purely descriptive process. He also suggested that blind tests were difficult to produce, in that the person designing the test must somehow avoid trace samples which anyone can distinguish (which would be pointless), or samples which even the best examiners will find hard to distinguish (which would only prove that trace examination is not easy).

Dr. Young testified that the CFS plans to engage in some blind testing, although it is not currently doing any.⁷⁵ The CFS has indicated that it has committed a quality assurance technician to the creation of blind tests. I encourage the CFS to pursue this method of testing, if at all practicable. Mr. Cook testified that his laboratory performs some blind hair and fibre testing. Mr. Lucas testified that a study in the United States is currently examining whether it is feasible to develop a blind proficiency testing program for forensic science. The CFS should look to these resources for guidance in developing its own program of blind proficiency testing.

Recommendation 27: Defence access to forensic work in confidence

(a) The Centre of Forensic Sciences, in consultation with other stakeholders in the administration of criminal justice, should establish

⁷⁵ In its written submissions, the CFS indicated that it is currently conducting blind testing.

a protocol to facilitate the ability of the defence to obtain forensic work in confidence.

(b) The Centre should facilitate the preparation of a registry of duly qualified, recognized, independent forensic experts. This registry should be accessible to all members of the legal profession.

The Centre's current policy dictates that its scientists may be retained by the defence at no charge. However, any findings must be provided both to the defence and to the prosecution. As a result, the Centre's scientists are rarely retained by the defence. This, in turn, fosters mistrust and a perception that the CFS is partial to the prosecution. As the Criminal Lawyers' Association notes, this mistrust has been exacerbated by the revelations at this Inquiry.

There was wide consensus that defence access to confidential forensic work by the Centre would reduce the perception of partiality. As well, as Mr. Cook, Dr. Young and Dr. Blake noted, it would better expose CFS scientists to both sides of the adversarial process, thereby enhancing actual impartiality.

There was also widespread recognition of the problems which arise from any defence access to the Centre's scientists on a confidential basis. These include:

- resource issues which could be expected to arise from increased use of the Centre by the defence;
- morale issues arising out of the prospect of one Centre scientist testifying 'against' another;
- difficulties in preserving confidentiality, particularly where two scientists from the same section are working on the case, one for the prosecution, the other for the defence;
- the inability of one scientist in a section to seek guidance from another, due to confidentiality issues, undermining the movement to increased monitoring and supervision and less isolation;

- concerns that the scientist's work may uncover evidence relevant to another case in which he or she is involved at the instance of the authorities (for instance, DNA results exculpate the client/accused on this case, but not on another case within the Centre).

The Criminal Lawyers' Association, the Canadian Bar Association — Ontario and AIDWYC forcefully contend that these issues can be resolved and that the importance of impartiality at the CFS compels access to confidential services by the defence. The Ontario Crown Attorneys' Association acknowledged the importance of the issue, but contended that the Centre does not have the institutional resources and, as currently structured, is unable to engage in confidential communications with defence counsel. It urged me to recommend that "there be a dedication of resources to permit defence counsel representing indigent accused to obtain the assistance of non-CFS experts on a confidential basis."

The Centre of Forensic Sciences provided a detailed analysis of the problems and proposed solutions. The analysis draws upon the evidence of Dr. Young and the other witnesses who testified before me. It reads, in part:

The CFS is aware that the disclosure aspect of its current policy is of concern to defence counsel and is interested in finding another viable option. A number of models for the provision of forensic services to the defence are available. Where the CFS is already doing work for the Crown on a case, defence work on that case could be done by (1) another jurisdiction (*e.g.* the R.C.M.P. or Quebec laboratories); (2) the CFS Northern Laboratory; (3) another person at the CFS. The CFS prefers and is currently exploring the first option, since it avoids a number of problems with the other possibilities. In particular, the CFS Northern Lab has very limited resources; there may not be enough scientists within the CFS to ensure complete independence from one another; and there may be a morale problem created if two CFS scientists take different positions in the same case. In addition, questions arise as to what obligations there would be on a CFS scientist in the event that work done for the defence reveals information about another crime being handled by the CFS on behalf of the Crown. In their visits to other laboratories, Drs. Prime and Young

found it notable that those which do defence work on a confidential basis generally find it very difficult to manage.

A fourth option, suggested to the Commissioner, is that a new institution be created with the specific mandate of performing work for the defence only. In Australia, for example, the National Forensic Institute, composed of five individuals, has a mandate of research as well as of service to the defence. The CFS does not oppose the creation of a separate institution, but is concerned that it would not be viable. It would require a huge investment of resources, for equipment and staff, all of which would duplicate services already provided by the CFS. Such expenditure would inevitably be a target for government cutbacks in the future. The institution would either disappear, or be too small to provide adequate service in all forensic disciplines. It is submitted that a solution which utilizes existing resources is preferable.

The CFS intends to invite open discussion with the defence bar as soon as the viability of the R.C.M.P./Quebec option is known. Negotiations with these parties have already been commenced. The CFS is prepared to look at other options if the R.C.M.P. or Quebec laboratories reject their proposals. For example, if necessary the CFS would consider the Australian policy discussed by Dr. Tilstone, which would be the following:

- With respect to items requested by the defence which had not already been examined by the Crown, the CFS would perform the work on a confidential basis as long as two scientists (a primary analyst and a reviewer) who had not worked for the Crown on the case were available to do the work.
- With respect to **new** tests on items requested by the defence which have already been examined by the CFS on behalf of the Crown, the CFS would perform new work on a confidential basis as long as the defence obtained the item from the Crown, and as long as two scientists (a primary analyst and a reviewer) who had not worked for the Crown on the case were available to do the work.

- The CFS would not perform re-testing or provide commentary on a report already made by someone working in the Centre.

Another aspect of the CFS policy which appeared to be troubling to the defence bar during the course of the Inquiry was the fact that their conversations with forensic scientists, to inquire about a particular case, are not treated as confidential. The current policy of the CFS is that reports to Crown counsel of conversations with defence are generally not encouraged, unless the information obtained from defence counsel impacts on the evidence which the forensic scientist intends to give at trial. In this circumstance, it is submitted that the forensic scientist has an obligation to inform the Crown that its view of the evidence has been influenced by information obtained from the defence. There are differing views within the CFS as to what information should be kept confidential since arguably the "client" relationship with prosecuting agents creates an obligation of complete disclosure. The CFS believes that the current policy is the only viable option. It is notable that in any event, today all conversations are recorded in the conversation log and thus are available to the Crown and the defence.

In my view, the defence bar has a need for access to confidential forensic services.⁷⁶ It would be ideal if the defence bar could obtain those services at the Centre of Forensic Sciences, given the pre-eminent role it plays in forensic science in Ontario. It would also enhance the impartiality and appearance of impartiality of the CFS itself. But I share many of the concerns expressed about the practical ability of the Centre to service the authorities and also service the defence bar on a confidential basis. Most particularly, there are great difficulties associated with the provision of confidential services to the defence where the section involved is also working at the instance of the authorities. Indeed, I wonder whether,

⁷⁶ I should again make clear that this need is to be distinguished from reciprocal disclosure, which I earlier addressed. It is one thing to suggest that the defence be obligated to disclose the expert evidence it intends to call so as to provide reasonable notice to the Crown and facilitate an informed treatment of science in the courtroom. It is another thing to inhibit the defence from investigating the scientific issues, because it fears that an unfavourable investigation will yield more evidence to be used by the prosecution in its case.

realistically, defence counsel would be sufficiently comforted by rules of confidentiality that they would retain a scientist working side-by-side with a scientist involved in the same case at the instance of the prosecution. These difficulties may or may not be resolvable.

I do not intend to recommend one solution over the other. That is because I strongly feel that the solution should be arrived at by the stakeholders in the justice system, not me. It is important that the CFS formulate its position on this issue, only after full consultation with all of the stakeholders involved, most particularly the defence bar.

Whatever solution is adopted, I agree with the Ontario Crown Attorneys' Association that the Centre should facilitate the creation of a registry of duly qualified, recognized, independent experts outside the Centre that can be accessed by the defence. Of course, defence counsel have no obligation to resort to such a registry. However, the use of the registry by the defence may significantly eliminate issues of expertise or competence arising at trial.

On a different, but related topic: conversations which CFS employees have with defence counsel at present are not confidential and may be reported to the Crown. Indeed, they should be noted, as should conversations with Crown counsel. However, I agree with the tenor of the Centre's submissions that CFS employees should not be encouraged to report on these conversations to the Crown, with the view to obtaining for the Crown a partisan advantage. They should be expected to advise the Crown of matters raised in their conversations with defence counsel which will have an impact on their evidence. The Crown is entitled to be so advised. Put succinctly, the scientist's conduct should be in keeping with his or her role as an independent, non-partisan expert witness. This also means that the Centre should encourage its scientists to be fully accessible to the defence, upon request. (The new Crown policy speaks to this issue.) In fairness, there is no evidence before me that the Centre has ever adopted a policy to the contrary.

Recommendation 28: The Role of the Scientific Advisor

The 1997 Report by Mr. Justice Archie Campbell addressed systemic problems identified as a result of the investigation conducted into the deaths of Leslie Mahaffy and Kristen French. The Campbell Report has been adopted by government and, as I understand it, multi-disciplinary working

groups are moving towards the implementation of the investigative model which it contains. The Campbell Report also introduces the role of a *scientific advisor* into the investigation of serious crimes.

The appropriate role of a scientific advisor to an investigation was revisited at this Inquiry in the face of the failings revealed here. The issue here was framed well in the submissions filed on behalf of the Centre and the Morins respectively.

Dr. Young outlined the Campbell model and its ability to address several problems also evident in the Jessop investigation. His (and the Centre's) position were articulated as follows:

A major issue raised during the Inquiry was the general lack of co-ordination and effective communication among the participants in the criminal justice system during the investigation stage of the Jessop homicide. These shortcomings tended to undermine a cohesive approach to the solution of the crime. It is submitted that many of the problems in the areas of co-ordination and communication apparent in the Jessop case will be eliminated with the full implementation of the new model for the investigation of major crimes in Ontario described in the 1997 Report of Justice Archie Campbell ("Campbell Model"), which has been adopted by Government. This model includes a new role for forensic sciences in the investigative process. The impetus for the Campbell model was the systemic shortcomings in the performance of law enforcement agencies in the investigation of the Jessop, French and Mahaffy homicides.

Dr. Young in his testimony described the Campbell model in detail and, in particular, its impact on the role of forensic science in major cases like the Jessop homicide. The Campbell model significantly enhances the co-ordination among those engaged in the investigation, including forensic scientists, by providing a simple and effective method for the exchange of information through multi-disciplinary case conferencing.

Where there is a major crime which is confined to one policing jurisdiction, a scientist from the Centre is appointed as scientific advisor. The scientific advisor

manages the case from the standpoint of forensic science and is the contact point with the Centre of Forensic Science. Such person will direct what work is done by the CFS and will not only prioritize it, but will prevent unnecessary use of resources on inappropriate or unproductive testing or analysis. In addition, the case conferencing called for in this model will maximize effective communication among those engaged in the investigation and minimize misunderstanding, including misapprehension of the significance of any forensic evidence.

In the case of multi-jurisdictional major crimes, or those crimes with that potential, the use of the Serial and Predator Crime unit may be triggered. Typically, but not exclusively, such triggering will be the result of crimes in different policing jurisdictions being linked by the ViCLAS system or by a hit in the DNA data bank. The prospect of effective use and communication of forensic science in the solution of crime is very much enhanced by the fact that scientific advisors representing the Centre of Forensic Science and the Coroners office are involved on the Executive Board of the Serial and Predator Unit continuously and, once the use of the Unit is triggered, such representation is present on the Joint Management Team which oversees the specific multi-jurisdictional investigation. In the multi-jurisdictional investigation model the benefits of improved communication of investigative findings, including scientific ones, is further enhanced by case conferencing at both the Joint Management Team and Executive Board levels.

A further benefit of the Campbell model arises from the fact that the multi-disciplinary case conferencing continues after the laying of charges and before the case proceeds to trial. Because of this feature, and the fact that the Crown attorney will then be involved, there is a much better prospect that those conferencing with the Crown will themselves have an accurate picture of the case, including the forensic science evidence and its significance, and therefore there will be less possibility of misunderstanding on the part of the Crown attorney.

In the result, when the Campbell model is fully implemented in Ontario the potential for unco-

ordinated investigation featuring inadequate communication and misunderstanding among participants should be a thing of the past. From the perspective of forensic science, as Dr. Young expressed it:

I think what we're trying to do is get a balanced approach that will create a quality investigation... The idea of it is that you need all of the components (police, forensic science, Crown) and the components must work in a cooperative way, but each must stand on its own, and must be impartial. And I think it's paramount to the whole model that impartiality in fact is built into it, and that those groups are not there to always get along and never challenge each other; quite the opposite.

During his testimony Dr. Young was asked whether the Campbell model might encourage lack of objectivity on the part of the forensic scientist. He responded as follows:

Well, you deal with tunnel vision in a different way. That's why there's a joint management committee, that's why the case conferencing is multi-disciplinary. Yes, there is a risk that people can develop that, but there's a greater risk if they're sitting in isolation. And I think Justice Campbell recognised that, and was very firm that you don't improve bad communication by doing less of it, and by isolation. You improve it by doing more of it, but you put protections in place. You have a multi-disciplinary approach, people will catch each other in that, and you make sure that objectivity is paramount to it.

I've never been to a meeting, a case conference, and I've been to a lot, where a multi-disciplinary approach where anybody is shy about saying to the police: You're off on a tangent, you're wrong about this, you have to do this. It just, by the nature of people interacting like that, they can't wait to get their views in, and to make sure that they're giving other ideas. And it's a risk that it doesn't happen. It works very well, and I can say that, because I've done it. I've done it extensively the last few years.

The forensic scientists who testified before the Inquiry also stated that full exchange of information is necessary. For example, Roger Cook put it as follows:

Q. To what extent is it necessary that the scientist work with the police?

A. I think it's absolutely necessary. I feel that we would not get the best Centre of Forensic Sciences if forensic scientists were locked away in a laboratory, and not working closely with investigators.

Problems arise when forensic scientists work in isolation without sufficient information concerning the investigation.

The Morins have suggested that "[i]n a major investigation, the person appointed as the scientific advisor to the investigation team should not be a scientist who is directly involved in examining evidence in the case." This is an excerpt from their submissions:

105. Cook provided information about the use of the specialist advisor in England. He testified:

This is a recent introduction within the Forensic Science Service. The specialist advisors are people who, particularly with large complex crimes, where there may be several different court-going officers. One, for example, looking at firearms, one looking at blood and blood stain distribution, and one maybe looking at hair and fibre work. The specialist advisor will take an overview of all that work, and facilitate the work for the police officers, so that the work was done on schedule, and on time.

And then bring the work together at the end, and ensure that there is an understandable interpretation for the prosecution services, as well as the police after the work has been completed. (Citations omitted.)

106. Young testified that present practice would likely result in the scientific advisor in a serious case being a scientist who was doing practical work on the

case. He did not believe that this would magnify the dangers of compromising the independence of that scientist. He strongly rejected the proposal in the form being recommended. He was asked:

Q. Do you not think, Dr. Young, that perhaps a better solution would be to have a scientific advisor present at case conferences who is not hands-on the case, who can in turn work with his own people subsequently —

A. No, I don't.

Q. [R]ather than potentially infect each and every scientist in the case with the police vision, which is so often tunnel vision, in the development of a suspect, leading to an arrest of a suspect?

A. No, I don't agree with that model, and the reason I don't is, what you lose in that is two things. You've improved the situation — I think it's an improvement on the current model, because what it does is, it means that the messages going back to the scientist are going back from a scientist, so you've improved on that problem. But what you've lost is, you're making an assumption that a scientist understands all of the aspects of science, and will get all of the messages right. And that's the problem, that they don't.

Unfortunately, his opposition does not take into account the kinds of dangers experienced in Morin's case, and discussed by Glidewell L.J. in the *Ward* case. The problems of lack of objectivity, lack of independence, and institutional bias are too well documented to be ignored. For a hands-on scientist to become a part of the investigative team would only exacerbate the dangers. The recommendation reflects a compromise between the need for good coordination of the investigation in a major case (as recommended in the Campbell Report) and the necessity to maintain as much as possible the integrity, objectivity and independence of the individual scientists doing practical work on the case.

The Centre, in turn, responded in this way:

Recommendation number 2-9 of the submission of Mr. Morin's counsel states that the scientific advisor should never be a person doing hands-on scientific work in a particular case. Dr. Young rejected this suggestion in his testimony, stating that it is the nature of the case which should dictate who the scientific advisor will be. The only fixed rule in relation to the scientific advisor should be that they are a senior scientist with appropriate training. Given the limited number of senior scientists available at the CFS, and the number of major cases which may require a scientific advisor, it is unrealistic to expect that the advisor will not be a hands-on scientist.

Moreover, the CFS disputes the suggestion that the involvement of the hands-on scientist in case-conferencing endangers objectivity. Indeed, it is envisioned that all scientists involved in the case may at some point take part in case-conferences. Dr. Young indicated that the model is intended to emulate the situation in England, described as follows by Mr. Cook:

This is a recent introduction within the Forensic Science Service. The specialist advisers are people who, particularly with large, complex crimes, where there may be several different court-going officers. One, for example, looking at firearms, one looking at blood and blood stain distribution, and one maybe looking at hair and fibre work. The specialist adviser will take an overview of all of that work, and facilitate the work for the police officers, so that the work was done on schedule, and on time. And then bring the work together at the end, and ensure that there is an understandable interpretation for the prosecution services, as well as the police after the work has been completed.... It's coordination, and working -- I mean, these are the people that I would see as working very closely with the police to make sure that they get the very best out of forensic science.

The point of the model is to get rid of the one-on-one

interactions which Ms. Nyznyk experienced in the Jessop case, but not to isolate scientists from the police. Communication is enhanced by the designation of a specific liaison person and by provision of a controlled environment for the free discussion of all scientific issues.

Also, it must be remembered that the scientific advisor will not necessarily possess all of the scientific expertise which needs to be canvassed within the case conference. There will always be a need for the scientists directly involved to speak with the investigation team.

My views fall between these two articulated positions.

A ‘scientific advisor,’ contemplated by the Campbell mode, serves an important role and addresses concerns identified at this Inquiry. The use of a ‘scientific advisor’ should, therefore, be encouraged. There should be no prohibition upon the designation as scientific advisor of a forensic scientist who is directly involved in the forensic examinations associated with the case. This is impracticable. However, mindful of the concerns identified at this Inquiry, the CFS should encourage, where practicable, to designate a scientific advisor who is not also the scientist whose own work is likely to be contentious at trial.

Recommendation 29: Post-conviction retention of original evidence

The Ministries of the Attorney General and Solicitor General, in consultation with the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for the post-conviction retention of original evidence in criminal cases.

There appears to be no overriding retention policy for original evidence in Ontario. Such a policy need be implemented, addressing, at a minimum:

- the length of time for retention;
- the physical locale for retention; and
- the conditions under which original evidence,

particularly biological evidence, is to be retained to prevent its contamination and degradation.

Such a policy must recognize that technology, as in the Morin case, may permit more discriminating testing to be done in the future and that a number of miscarriages of justice have only been rectified through the testing of original evidence retained well beyond the expiry of conventional judicial proceedings. Such a policy may also take into consideration the extent to which the proceedings to which the original evidence relates were contested, and the extent to which the evidence bore upon contested issues. One issue which should be explored is whether an accused can waive the retention of original exhibits by the authorities.

The CFS has undertaken a survey of retention schedules in laboratories around the world. A wide variation was found, reflecting the fact that there are no universally held views on the matter. The ongoing advancements in DNA testing has made this an important issue to address.

This problem is being wrestled with in other jurisdictions as well. For example, Frank Sundstedt told the Inquiry that there was an 'ongoing legal debate' in Los Angeles respecting this issue.

Dr. Young recognized the importance of retention:

A. Storage and retention, I think we should realize that this is a relatively new issue, because of the advent of DNA that — I mean, we've gotten through — the first one hundred years we saw a forensic science without this being a big issue, so what was done, and how it was done is, as I think the panel indicated, is loopy-goopy to say the least. It's because it just wasn't an issue. It was very, very rare that something came up.

DNA and biology specimens are changing that, and there's no question, there isn't policies anywhere right now that I'm aware of that are very definitive. Everybody's struggling with this. We asked about it in England, and I gather from Doctor Robertson that it's a problem in Australia, as well. Generally, the approach is to make it a police responsibility to store. We are going to have to at some point work out the guidelines of where and how. We're trying to work the guidelines at the Centre for what we'll retain and how we'll do it,

as well, and we're drafting papers on that.

But our suspicion is, as Doctor Robertson says, that the bulk of the things will probably go back. They go back sealed now, but what happens to them, I think that's a valid issue, but one that there shouldn't have to be a lot of work done, whether we've built — you know, one place for the whole province or whether the municipal police do it and how big they will be and how long we keep them, because there isn't finite space.

Q. No, I appreciate it, I take it as a matter of principle because of the evolving of nature of the technology, you'd agree that accommodation should be made to house, in a way that is safe and secure, as well as to ensure that they don't get contaminated, these exhibits, for a much longer time than we do it today?

A. I'd say it's wonderful if you can go back and you've got the specimen and you can test it and solve the problem, and that's what we're all interested in. I have no problem [with that] at all.

I was later advised of the particulars of the draft policies currently contemplated by the Centre. They contain these features:

- Items submitted for examination will generally be returned to the submitter at the completion of a case.
- Materials removed from items which are in a form that can be packaged so as to preserve their integrity will be returned with the other items and a notation made in the record of their disposition with the case file.
- Materials whose integrity would be compromised by return to the submitter will be retained at the CFS according to a specifically designed policy for each section. The retention of this material and its storage location will be noted in the case file and in a separate log maintained for this purpose.
- Under no circumstance will case items or sub

samples⁷⁷ be retained in files.

The draft policy for the biology section, in respect of items which are not returned to the submitter, is the following:

- Hair and fibre slides and tapings will be retained for 10 years after the work is done in non-homicide cases and indefinitely in homicide cases.
- Fluid blood samples will be retained and then destroyed two years after the work is done in cases involving death and after three months in other cases; the blood stain produced from these samples will be returned to the submitter with other case items on completion of the case.
- Amplified DNA will be retained in a frozen state and then destroyed after six months.
- Extracted genomic DNA will be retained in a frozen state indefinitely.

This draft policy is already in operation, to be finalized along with the other policies currently in development.

There is much in this draft policy that commends itself to me. However, since it only became known during closing submissions, I do not intend to comment further upon its specifics. It is important that the CFS seek out the reaction of other stakeholders to the policy before finalizing it.

Recommendation 30: Protocols for DNA testing

The Ministries of the Attorney General and the Solicitor General, in consultation with the forensic institutions in Ontario, the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for DNA testing of original evidence.

⁷⁷ I presume these are samples extracted from original evidence (for example, fibres on slides taken from fibres on tapings). There was no evidence on the point.

In the *Morin* and *Milgaard* cases, protocols were established to permit the DNA testing of original evidence in a way that was satisfactory to all parties. It would be advisable that protocols be generally established to address these kinds of situations, particularly where there is a defence request for DNA testing after conviction.

Recommendation 31: Revisions to Crown Policy Manual respecting testing

The Ministries of the Attorney General and Solicitor General should amend the Crown Policy Manual on physical scientific evidence to reflect that forensic material should be retained for replicate testing whenever practicable. Where forensic testing at the instance of the authorities is likely to consume or destroy the original evidence and thereby not permit replicate testing, the defence should be invited, where practicable, to observe the testing. Where defence representation is impracticable (or where no defendant is as yet identified), a full and complete record must be maintained of the testing process, to allow for as complete a review as possible.

One of the systemic issues before me was the appropriate practice to be followed where original evidence would be destroyed or consumed by scientific testing.

The CFS said this:

One of the systemic questions raised before the Commission was what should be done regarding material which would be consumed or destroyed if a certain procedure is performed on it. Drs. Tilstone and Robertson were of the view that it is preferable to consume only that amount of material which is necessary to perform the test, so that sufficient material is available to repeat the test at a later time. However, if there is insufficient material available to perform a test, or the material would be destroyed by a particular test, then the value of the particular test must be assessed. They agreed that they would have,

[N]o hesitation in consuming all of a sample where I believe that I could get the most

discriminating test done, because of my assuredness that the defence could test what I've done by view of the records of the work.

Dr. Robertson also stated that a policy whereby the client and/or the defence is notified every time a specimen is consumed would be very impractical.

The CFS takes the same view as these experts. With continued attention to record keeping one can be assured that the CFS will be able to provide an accurate and meaningful review of the tests done by CFS scientists.

Dan Mitchell, a senior prosecutor in Thunder Bay, also reflected his concern that some scientific testing that is destructive must be done at the earliest opportunity and cannot await defence involvement (for example, lifting fingerprints from a crime scene).

In my view, there are several related issues raised.

First, it is obvious to me that, as Dr. Blake stated, "the hallmark of scientific reliability is the ability to reproduce a result." It follows that, wherever possible, sufficient material should be retained to allow for replicate testing by the defence, if desired. ASCLD guidelines provide that every effort must be made to save as much material as possible for potential re-analysis in the future. Dr. Blake stressed the importance of retaining sufficient biological evidence to allow for replicate testing, noting that the National Academy of Science in the United States recently approved of the principle with respect to DNA testing. Dr. Robertson testified that the principle has been included in Australian forensic protocols. Dr. Young accepted that the principle is a good one.

Second, sometimes destructive testing is the most desirable and discriminating testing available. What should the forensic scientist do where such testing is indicated, but the preservation of sufficient material to permit re-testing is unlikely or impossible (for instance, highly discriminating testing that will destroy the tested fibres)? In my view, protocols should govern such testing. The defence (most probably through a retained expert) should be invited to observe the destructive testing as it occurs. In the event that there is no defendant at the time of the test, or performance of the test cannot await such an invitation, the CFS should retain as complete a record of the testing

and the results as possible in order to allow for scrutiny by any future defendant.

The Runciman Report in England included a similar recommendation. It reads:

Where scientific material is in the hands of the prosecution, and a suspect has been charged and is legally represented, the defence should have an enforceable right to observe any further scientific tests conducted on it or, unless the material exists only in minute quantities, the right to remove some of the material subject to proper safeguards, so that tests can be carried out by defence scientific experts.

The current Crown policy on scientific evidence makes no reference to the issues of preservation of evidence and destructive testing in the context of examinations conducted on behalf of the Crown. It should be amended (along with any related CFS policies) to reflect the principles I described above.

The current Crown policy does refer to testing by the defence. In the context of evidence which forms part of a court exhibit, the policy states that “it will generally be appropriate to seek to have the Court include in the order, terms governing ... attendees at testing and *requiring that an official appointed by the Crown be present*” (emphasis added). These terms will normally be appropriate where the testing is destructive (in the way I earlier described). Of course, there may be other circumstances where the presence of a Crown appointee is mandated. However, in my view, it is difficult to understand why the presence of an official appointed by the Crown should normally be sought or ordered otherwise. It is my understanding that Crown counsel do not make this request as a rule now. Any issues of continuity are addressed through other terms imposed upon the defence and its representatives.

Recommendation 32: DNA data bank

A national DNA data bank, as contemplated by Bill C-3, now before Parliament, is a commendable idea, proven in other jurisdictions, and it should be adopted in Canada.

Canada would not be alone in creating a national DNA data bank. Dr. Tilstone advised that 48 American states have passed DNA data bank legislation. Dr. Robertson pointed out that England and Wales have a very large and successful database, and that Australia and New Zealand are working towards creating their own data banks. Dr. Young stated that the experience in Britain and elsewhere has shown that such databases help solve old serious crimes.

There was widespread support for the creation of a DNA data bank amongst the parties at this Inquiry. The York Regional Police Association made forceful submissions in its favour. In my view, such a data bank would be a useful investigative tool, both in identifying guilty parties and in excluding suspects.

I do not intend to comment upon the nuances of the legislation currently before Parliament. No submissions were directed to that issue. My recommendation is intended only to support the principle of such a bank.

Recommendation 33: Backlog at the Centre of Forensic Sciences

The Centre of Forensic Sciences should eliminate its backlog through increased use of overtime and an increased complement of scientists and technicians to enable it to provide timely forensic services. This can only come with the appropriate allocation of government funding specifically earmarked for this purpose.

During the Jessop investigation and the *Morin* proceedings which followed, the Centre of Forensic Sciences, most particularly the biology section, was burdened with a heavy workload and backlog of cases. Dr. Young advised me that this backlog continues to burden the CFS to this day. The survey of Ontario prosecutors, filed by the Ontario Crown Attorneys' Association, reflects that 74 percent of the respondents have experienced significant delay in obtaining forensic results, with the biology section involved 61 percent of the time. Mr. Lucas testified that the backlog has forced the CFS to prioritize examinations on the basis of meeting court dates, as opposed to more desirable bases such as providing investigative leads. He added that this has been particularly true in the biology section.

This situation is unquestionably problematic. As I indicated earlier, although time constraints always exist, overloading scientists through

excessive workloads is a recipe for disaster. It can contribute to the conviction of the innocent and the exoneration of the guilty through sloppy or incomplete science.

Dr. Young reflected, *inter alia*, on the desirability for increased training, education, monitoring and supervision, proficiency testing, the increased documentation of scientists' work and their contacts with others, and more complete and accurate report-writing. Though these and other recommended changes are of critical importance, they can also result in increased backlogs, since they take away from the time that scientists otherwise have to conduct casework. Dr. Robertson agreed, pointing out that it takes a lot of time to write reasonably full reports; if those kinds of reports are desired, sufficient resources have to be put into a laboratory to allow scientists the time to write them. On a larger scale, he said that a critical mass of expertise and resources must be maintained at a laboratory in order to do trace work properly, and it must be accepted that an analyst may have to spend months on one case.

Many of the recommendations contained in this Report will increase the time and financial constraints on the CFS.

Dr. Young testified that the CFS was recently given an additional \$300,000 — money which will likely be spent on overtime by the end of the 1997/1998 fiscal year. He stated that the CFS needs additional funds in order to continue to combat the backlog problem. I agree.

Recommendation 34: Forensic research and development

The Centre of Forensic Sciences should dedicate resources to research and development. The Province of Ontario should provide adequate funding to implement this recommendation.

In its written submissions, the Centre of Forensic Sciences stated:

Research and development should be an integral part of operations at the CFS. Drs. Prime and Young observed that this was the case in the best laboratories around the world, where it is recognized that being on the leading edge requires involvement in current scientific issues. The importance of research was also recognized by the Runciman Commission. Increased involvement of the

CFS in research will require a major infusion of funding.

I endorse this suggestion. Without research and development — and funding for it — the CFS risks becoming outdated in its technology and procedures. Further, the extent to which meaningful inferences can be drawn with any degree of reliability in hair and fibre or serological work is dependent on research. Given the ever-increasing reliance on forensic evidence, it is imperative that the best science possible be employed.

Recommendation 35: Resource requirements

The specific recommendations referable to the Centre of Forensic Sciences involve, by necessary implication, the infusion of additional financial resources into the Centre. It is imperative that such an infusion occur, to ensure that the Centre can serve a pre-eminent role as a provider of critical forensic services, that it can do so in an impartial, accurate and timely manner, and that future miscarriages of justice can thereby be avoided. In this context, miscarriages of justice include both the arrest and prosecution of the innocent, and the delayed or failed apprehension of the guilty.

On the issue of resources, the Centre said this:

It is submitted that the CFS has done all that it can to better itself within the constraints of its current budget. A significant amount of new resourcing has been provided to the CFS since the mid 1980's, including creation of the Northern Lab, introduction of DNA technology with the building of a new facility and with new staff, new equipment for the hair and fibre unit, and \$300,000 of funding to begin backlog elimination. Funding has also been provided to staff the new quality assurance unit.

Nevertheless, it continues to be the case that the goal of timely casework competes with the goal of quality assurance, since supervision, training, peer review and continuing education all require time away from casework. To date, accreditation has been achieved with minimal increase in resources and thus has had an adverse impact on the backlog and timeliness. Timeliness is particularly important if

forensic science is to be used effectively as an intelligence tool. Timeliness not only can affect the direction of an investigation, but also can assist in the cost-effective management of police resources at the outset of an investigation.

Therefore, in addition to the steps which the CFS has already been able to implement, it is of vital importance to the capacity of the CFS, to maintain an adequate standard of forensic science services, that the necessary funding be obtained so that the following steps can be taken:

- The backlog at the CFS should be eliminated. This will require that the CFS be able to fund overtime to do a backlog elimination blitz. Without such a blitz the CFS and the justice system will be shackled with the inability to provide timely forensic services.
- The number of full time staff (scientists and technologists) at the CFS should be increased. This will require that the CFS receive funding for additional positions.
- The training program should be broadened further to include, in addition to the mentoring components, more formalized programs, including formalized ongoing staff development. This will require an increase in funding designated for training, including funding for regular attendance at courses offered by other institutions and at scientific conferences, particularly those where the defence perspective is presented.

In my recommendations and commentary upon them, I have supported these and other changes. Some of them, like those mentioned here by the Centre, are dependent upon financial resources. In my view, it is imperative that these financial resources be provided. Although fiscal constraints on government cannot be ignored, quality cannot be sacrificed. The stakes for the criminal justice system are too high.

III

Jailhouse Informants

A. Introduction

As outlined earlier, Phase I of the Inquiry examined the issues which arose out of in-custody statements allegedly made by Guy Paul Morin in the presence of Robert Dean May, and overheard by Mr. X. After Mr. Morin was arrested on April 22, 1985, he was taken to Whitby Jail. While in custody there, he encountered these two inmates. They testified for the prosecution at both trials of Mr. Morin. They are labeled 'jailhouse informants' because they claimed to have overheard a confession made by Mr. Morin while all three were inmates at the jail.

B. Evidence Relating to Jailhouse Informants

(i) Overview

Both informants gave evidence before the Commission, as did many of the relevant authorities (police, Crown attorneys and jail administrators) who had direct or indirect dealings with them. Some of these witnesses also gave evidence at one or both of Mr. Morin's trials.

The evidence in this Phase of the Inquiry gave rise to a large number of factual issues, as well as some significant systemic ones. Systemic issues will be addressed later on in the Report. The factual issues can be broadly grouped under the four larger issues listed below. It must be recognized,

however, that these groupings are not mutually exclusive: the evidence and issues considered under each heading necessarily overlap and cannot be considered in isolation from one another. They are simply presented here in order to make the task of assessing the voluminous evidence presented before the Commission easier and more comprehensible.

Credibility. A basic issue before the Commission was whether the evidence of the informants is worthy of belief. A determination of this issue involves a subjective assessment of the manner in which they testified; it also involves an examination of the details of their evidence, their motives for fabrication, and the possibility of collusion between them. Evidence heard before the Commission which bore upon this issue included an inquiry into the backgrounds of the informants (including their psychiatric and psychological profiles), the circumstances of their incarceration, their association with each other, their conduct around the time of the alleged confession, their conduct after the trials, and the benefits they sought or received for their testimony.

Set-Up. An allegation which was made after Mr. Morin's second trial is that the informants' evidence was enlisted by one or more public authorities (and not merely initiated by the informants themselves) in order to bolster the prosecution's case against Mr. Morin. A primary subject of this allegation is Detective Bernard Fitzpatrick. It has been alleged that, either alone or in concert with others, Detective Fitzpatrick made prior arrangements with Mr. May to produce a 'confession' from Mr. Morin and to testify to this 'confession' at Morin's trial. Accordingly, evidence heard before the Commission which bore upon this issue included that pertaining to any prior association between the police and the informants, visits to the informants by the police prior to the confession, indications that evidence of such visits was destroyed, the reasons for the placement of the informants within the jail, and any conduct or words by the police or others suggesting the existence of a 'set-up.'

Should The Evidence Have Been Used? Irrespective of any allegation of a set-up by the public authorities (in which case it is obvious that the evidence of the informants should not have been used), the question arose as to whether the prosecution should have used the evidence of the informants in the particular circumstances. In other words, were there indications that their evidence was so unreliable that it should not have been included as part

of the Crown's case? Evidence heard before the Commission which bore upon this issue included that pertaining to the circumstances in which the informants came to the authorities, the benefits requested by the informants, the timing of the decision to offer those benefits, the nature of those benefits, the indications that the informants' evidence was unreliable (such as any propensity to lie), the extent to which the authorities considered and discussed those indications, and the steps taken to ensure the informants' reliability. In assessing this evidence, I am mindful of when it was that indications of unreliability surfaced. For example, the prosecutors at the second trial were not aware until after the trial that May had recanted.

The Offer Not To Testify. It was revealed during the course of the second trial that the Crown had given the informants the option not to testify. The defence alleged that this offer was a ploy used to artificially bolster the informants' tainted credibility. This allegation suggests that the offer was insincere and would not have been honoured had it been accepted. And even if the offer was genuine, it was kept secret so that it could be used to unfairly undermine the defence position. Evidence heard before the Commission which bore upon this issue included that pertaining to the reasons for the offer, when and how it was communicated, the responses to it, the disclosure of the offer to the defence, the way in which it came out at trial, and whether the prosecution intended that it to come out at trial.

(ii) Credibility

Basic Evidence

One of the jailhouse informants was Robert Dean May. Commencing on June 27, 1985, Mr. May shared the same cell as Mr. Morin in the protective custody wing of the Whitby Jail. He testified at both trials that on June 29-30, 1985, he and Mr. Morin engaged in conversations about Mr. Morin's case. He further testified that on the night of June 30-July 1, 1985, Mr. Morin became upset and cried out "Oh fuck, why did I do it, oh fuck, man, fuck, I killed her, I killed that little girl." In his testimony before the Commission, Mr. May said that his recollection of the events of that night was near to none; he could not recall the exact words used by Mr. Morin, nor was he sure anymore of what he heard. He 'believed,' however, that Mr. Morin said he killed Christine Jessop:

Q. Well, now, is there any doubt in your mind that Guy Paul Morin said that he killed that little girl?

A. No, I don't believe so.

Q. You don't believe so. I think it's now time to think hard about it, sir. Is that what he said, or might he have said something else?

A. I believe that that was what he said.

The second jailhouse informant was Mr. X. Commencing on June 28, 1984, Mr. X occupied the cell immediately beside the cell shared by Messrs. Morin and May. He testified at both trials that on the night of June 30-July 1, 1985, he overheard the confession purportedly uttered by Mr. Morin. In his evidence before the Commission, Mr. X remained confident of the accuracy of his trial testimony. He stated that on the night of June 30-July 1, he was reading his Bible in bed,

and I overheard some discussions in the cell next to me. And I heard someone weeping, and I kind of paid a little more attention. And the voice got a little louder, and I heard, "Fuck, man, fuck, I killed her, I killed that little girl." And it's my belief that it came from Mr. Morin.

Mr. X only heard the one phrase. He could not say what was said before or what was said afterwards.

Backgrounds of the Informants

Robert Dean May

Robert May acknowledged having a criminal record dating back to when he was 18 years old. Many of his crimes were crimes of dishonesty, involving forged documents, NSF cheques and thefts. At the time he reported Mr. Morin's alleged confession to the authorities, he had already been convicted of 11 separate offences. The details of his criminal record (both before and after his testimony) are set out below:

Date of Conviction	Offences	Sentence
February 26, 1981	Break & enter & theft Theft over \$200	Suspended sentence + 18 months probation
February, 1983	Breach of probation	Suspended sentence + 2 years probation
April 15, 1985	Utter forged document X2 Failure to appear X2 False pretenses over \$200 X2 False pretenses under \$200 Accommodation fraud	Total sentence of 6 months in jail
August 23, 1985	Assault causing bodily harm	16 months in jail + 2 years probation
August 10, 1994	Possession of stolen property over \$1000	\$1400 fine + 18 months probation
September 21, 1994	Criminal harassment Utter death threat	Total sentence of 5 months in jail + 2 years probation
October 5, 1995	Break & enter & theft	2 years probation, including restitution

The defence at the second trial called three expert witnesses with respect to Mr. May's character. All three testified that Mr. May had a propensity to lie.

Dr. Birgitta Jansen was a staff psychometrist (and later a psychologist) at the Whitby Psychiatric Hospital. Mr. May was held in custody at the hospital for a brief period in 1985 for purposes of a psychiatric assessment (Mr. May ultimately escaped 11 days after he was admitted). Dr. Jansen diagnosed Mr. May as having a "personality disorder, mixed type, with antisocial narcissistic and passive aggressive characteristics." She explained that Mr. May demonstrated an inflated self-esteem, an expansive and uncontrolled imagination, a willingness to use other people to indulge his own desires, an unshaken arrogance, and a deficient social conscience with a disregard for the personal integrity and rights of others. *She considered Mr. May to be a pathological liar.* Someone like him, she said, has "an indifferent conscience, an aloofness to truth and social responsibility that, if brought to

the individual's attention, elicits an attitude of nonchalant innocence Though totally self-oriented, these individuals ... are rather skilled in deceiving others with their clever glibness." She continued:

Rather than apply their talents toward the goal of tangible achievements, they will devote their energies to construct intricate lies, to cleverly exploit others, and to slyly contrive ways to extract from others what they unjustly believe is their due. Untroubled by conscience and needing nourishment for their overinflated self-image, they will fabricate stories that enhance their worth and succeed in seducing others into supporting their excesses. Criticism and punishment are likely to prove of no avail since this personality quickly dismisses them as the product of jealous inferiors.

Dr. Glenn Cameron was a physician with the forensic assessment unit of the Penetanguishene Mental Health Centre (later certified as a psychiatrist in 1990). Mr. May was sent to Penetanguishene in early June 1985 for a further psychiatric assessment. Dr. Cameron diagnosed Mr. May as having an anti-social personality disorder. He described May as a con man, a liar, a manipulator. He stated that May was very good at deception: *"It was extremely difficult to ferret out what was the truth and what was untrue."* He felt that May was always looking for something to trade. He continued:

Mr. May was an individual who lies, who did not tell the truth and who frequently interacted with others in his environment through deception, through misrepresentation, through fraudulent means. He was someone who possessed no remorse, felt no sense of guilt or moral obligation for the things he did ...

As for Mr. May's claim that he heard Mr. Morin confess, Dr. Cameron stated:

I think there are many levels of what's going on when Mr. May talks about his confession from Mr. Morin. One of the psychological explanations would be that he was trying to present himself as someone more famous or omnipotent than he was. On a very practical level, again, I think he was trying to curry favour with the police. This certainly fits into his character as I understand it. And on a completely other level, he's a

man who when I saw him just wasn't capable of telling the truth about important things that were happening in his life in his circumstances.

Dr. Andrew Malcolm was a forensic psychiatrist whom the defence had retained to carry out a mental status assessment of Mr. May (and Mr. X). Both informants refused to be assessed, but Dr. Malcolm arrived at an opinion concerning Mr. May based on May's psychiatric file, his behaviour in court, and other related information. He expressed the view that Mr. May exhibited the same personality disorder while on the witness stand at the second trial as he did in 1985. He had no doubt that May suffered from severe primary psychopathy. He had no resistance to lying:

And so the combination of a natural tendency to lie, plus a natural tendency not to have a conscience allows them to say anything that they want to say that they think would be to their own advantage.

.....

The result of all that is that such people are famously unreliable as informants.

Dr. Malcolm prepared a further opinion of Mr. May in 1994.¹ He affirmed that Mr. May is a "gifted confidence man" with a "tendency to prevaricate" and limited internal restraint. He concluded as follows:

It is my opinion that Mr. May, ... with a fair amount of information unavailable, particularly from his earlier years, is a person with an antisocial personality disorder. In the D.S.M. IV, this is a person in which there is a pervasive disregard for and violation of the rights of others. There is a failure to conform to social norms, deceitfulness, impulsivity, aggressiveness, the reckless disregard for the safety of others, consistent irresponsibility and a lack of remorse. Mr. May shows all of these traits.

I said all of this at the second trial of Guy Paul Morin

¹ The opinion is contained in a letter dated December 18, 1994, and is reproduced in an affidavit sworn for the purposes of Mr. Morin's appeal against conviction.

and everything I have learned about Mr. May since that time has served to reinforce the strength of this opinion ... *Mr. May is not a trustworthy man, and anyone would be well advised to be very sceptical indeed about any assertion he might make, particularly when to accept his word at face value would result in some advantage to him.* (Emphasis added.)

In his testimony before the Commission, Mr. May acknowledged having had a problem with lying in the past (including 1985). He agreed that he has lied quite freely in situations where he did not think he would be caught, 'conned' people into doing things that would help him, and lied to the authorities. Mr. May testified that he no longer lies. It was suggested to him that he had recently apologized to Commission staff for lying to them about not being able to accept service of a summons because he was about to leave on an airplane. Mr. May seemed neither to accept nor deny this suggestion.

Mr. May agreed that he has an ability to manipulate people and events to his own ends, and that in at least one instance (an August 19, 1994 television interview replete with lies) *there was no obvious way of determining when he was lying and when he was telling the truth.* He denied, however, that he has no conscience or that he lies as a means of self-aggrandizement. He pointed out that he has had numerous opportunities to enjoy media attention (and thereby inflate his ego), but has only availed himself of the opportunity once.

Mr. May further denied that he would lie about a murder in order to obtain an advantage for himself. He agreed that he would not be in any position to acknowledge to the Commission that he had lied at Mr. Morin's trials, given the attendant prospect of perjury charges, but maintained that he had told the truth.

Mr. X

Mr. X has a lengthy criminal record for sexual offences, particularly offences against young children. His first criminal conviction came when he was still a juvenile, at age 15. At the time he reported Mr. Morin's alleged confession to the authorities, he had already been convicted of nine separate offences. The details of his criminal record (before and after his testimony) are provided below. In his testimony before the Commission, Mr. X

acknowledged committing these offences, but often displayed an inability to recall any of the details of his illegal acts.

Date of Conviction	Offences	Sentence
1976	Assault X5	-----
June 16, 1977	Contributing to juvenile delinquency	18 months probation, including an order for psychiatric treatment
October 12 , 1977	Indecent assault X2	9 months definite + 3 months indefinite
June 26, 1985	Sexual assault	60 days in jail + 18 months probation
October 24, 1988	Sexual assault	9 months in jail + 2 years probation
1994	Communication for the purpose of prostitution	\$150 fine

Evidence was adduced at the second trial through Dr. Zehanat Khan concerning Mr. X's psychiatric profile. Dr. Khan was a psychiatrist and clinical director of adult mental health at the Oshawa General Hospital. He reviewed Mr. X's psychiatric history and transcripts of X's evidence at the trial. He diagnosed Mr. X as suffering from a personality disorder with predominantly dependent and sociopathic characteristics. *This is a condition which is characterized by exaggeration, lying, disregard for social norms and dependency.* Dr. Khan explained:

The dependent part of the character disorder or the personality disorder refers to the person being passive in relationships, letting the other partner tell them what to do, practically let them run their lives, being very dependent for their emotional needs on others, being very dependent on feeling good because of what others tell them, being highly suggestible, also, to these dominant partners that they might have.

In his testimony before the Commission, Mr. X did not recall much about this diagnosis, but he did remember telling various people at various

times that he was losing contact with reality, that he heard voices in his head, and that the voices were so loud that he thought his head was going to explode. Indeed, he explained his history of sexual misconduct by the fact that he heard the voice of his dead uncle telling him to perform the illegal acts. Mr. X also stated that he had been sexually abused himself.

Dr. Malcolm also reviewed material relating to Mr. X, and came to the following conclusion regarding the interaction of a dependent personality like X and a person like May:

So the combination of someone who is suggestible and not very strong with someone who is really quite powerful and effective in speaking is quite dangerous because it means that the weak person will be strongly influenced and recruited by the stronger person. This is well known to occur.

Mr. X agreed that he has told 'his share' of lies in his life. He acknowledged that he has lied to the police in the past (including some lies in the very interview with the police where he discloses Guy Paul Morin's confession), and that it is second nature for him to lie to the police when in trouble. He further acknowledged lying on at least one occasion to the correctional authorities.

Prior to trial, the prosecution had access to the psychiatric records of May and X. At trial, it challenged the evidence given by the defence experts. Cross-examination was directed to a number of issues, including the adequacy of the evidentiary foundation for their opinions, the inconsistencies in their diagnoses, the inferences that could truly be drawn from the available material, and the subjectivity or frailty of their assessments.

Circumstances of Incarceration

Robert May

On April 15, 1985, Mr. May was sentenced to serve six months in jail for the various offences of which he had been convicted. This was his first jail term. Eleven days after he was incarcerated he attempted to escape by assaulting a jail guard with two bars of soap hidden in a sock. The guard was injured in the attack, and May was later charged with assault causing bodily

harm. The escape attempt failed, so Mr. May asked his lawyer to have him remanded to the Whitby Psychiatric Hospital for a 30-day mental assessment. Mr. May admitted that he made this request because the hospital was a minimum security institution from which he would be able to escape. He availed himself of this opportunity in May 1985, and was unlawfully at large for a period of five days. During this time he stole a vehicle as well as some other items. He was later charged with escape custody and theft over \$1,000. After his recapture, he was sent back to the Whitby Jail. However, he did not stay there for long. In early June he was sent to the Penetanguishene Mental Health Centre for a 60-day psychiatric assessment. Mr. May later admitted that he wanted to go there to attempt a further escape, and while at Penetanguishene he hatched a plan to do so. His plan was discovered in advance, however, and he was returned to the Whitby Jail on June 27, 1985.

In his testimony before the Commission, Mr. May admitted that in June, 1985 he wanted badly to get out of jail and was prepared to do whatever was necessary to do so. He was scared. He said he was being violently mistreated by the jail guards, and would have done anything to stop the assaults. He was trying to get parole, but agreed that his chances were probably zero. He was concerned about his three outstanding criminal charges. He was guilty of the offences. The guard whom he had assaulted during his first escape had been seriously injured: he was hospitalized for three days, and suffered from headaches to an extent that doctors contemplated surgery in order to relieve pressure on his cranial nerve. Mr. May believed that the penitentiary was “staring him in the face.”

Mr. May stated that Mr. Morin was “hot currency” in late June 1985.² He further stated that while he knew that being an informant could jeopardize his safety in jail, he was prepared to assume that risk.

Mr. X

Like Mr. May, Mr. X testified that he wanted out of jail “bad.” When he was sentenced on June 26th, the presiding judge had recommended him for the Temporary Absence Program (“TAP”), yet he had been denied TAP by

² From the context, an inmate becomes ‘hot currency’ when it appears likely that the authorities will provide a significant reward in return for incriminating evidence against that inmate.

the correctional authorities. He was upset about that turn of events. Mr. May confirmed that Mr. X was concerned about getting TAP, but added that Mr. X seemed to feel that he would get it because his sentence was short and he had a job waiting for him.

Mr. X was a nervous wreck. He feared that by remaining in jail he was going to lose his job, lose the house he was planning to buy, and lose his wife (who was threatening to leave him). Mr. X agreed that all this was a 'huge concern' for him, *and it was the very thing he was thinking about when he purported to overhear Mr. Morin's confession.*

Association Between May and X

Messrs. May and X did not know each other before they were incarcerated together at the Whitby Jail. Both witnesses agreed that they spoke to each other during the final days of June, 1985, but they characterized their relationship somewhat differently.

Mr. X testified that he thought Mr. May was smart "educated wise." He trusted Mr. May and confided in him about his concerns over his wife and the house he hoped to buy. Mr. May offered to lend him money, without Mr. X having asked for it. Mr. May also used to talk to Mr. X to calm him down when he became nervous. Mr. X testified that by July 1, 1985, he knew Mr. May as well as one could know someone in four days. He did not, however, feel protected by him, or rely on him for information as to how to get along in jail.

Mr. May testified that he had no relationship with Mr. X. He was just another inmate. He did not become a friend. May agreed that he offered to lend Mr. X \$5,000, but stated that this was a lie, said only to induce X to stop whining. At Mr. Morin's first trial, Mr. May did not allege that this offer was not genuine. The defence at Mr. Morin's second trial alleged that the offer was a bribe designed to induce X into becoming a corroborating witness.

Mr. May denied that he found in Mr. X a person who could corroborate the story of a confession by Mr. Morin.

The Night of the Alleged Confession

Premonitions of a Confession

Both May and X advised the police *in separate interviews* on the day after the confession that they had had a feeling in advance that ‘something’ was going to happen. Mr. May was not questioned about this in his appearance before the Commission, but Mr. X was asked to elaborate:

Q. Now, when you say that you had the feeling that something was going to happen, do you mean by that that what you thought that was going to happen was that Mr. Morin was going to give some information out about that murder?

A. I really can’t answer that. I don’t know. I just knew something was wrong and I couldn’t pinpoint it.

Q. Could you describe that feeling just so that we have an idea what you’re talking about?

A. I really didn’t understand what Mr. Morin was talking about and I kind of thought, well, what’s he up to, or what’s he doing, or whatever. And that’s basically how I came to that conclusion.

Reactions to the Confession

In their separate statements to the police on the day following the alleged confession, both Mr. May and Mr. X stated that they had been upset by the confession and had wanted to act out in response to it. Mr. May gave no evidence about this in his testimony before the Commission. Mr. X, however, reiterated that he was very upset and angry at hearing the confession. When asked why he, with his lengthy record for sexual offences against children, would be so upset at hearing such a confession, Mr. X responded that in his mind there is “a big difference between assaulting children and killing children.”

Mr. X’s cell mate, Kenny Doran, was in the cell when Mr. X purported to overhear Mr. Morin confess. He had no reaction to Mr. Morin’s words. Mr. X testified that Mr. Doran was in bed, with his head against the

wall, and was not moving. He did not know whether Mr. Doran was awake.

Mr. X did not make any comment to Mr. Doran about what he had overheard, despite the fact that he was upset about it. Mr. X never asked Mr. Doran whether he had overheard the same thing. Mr. X had no explanation for why he failed to do that.

Mr. X testified that he was still upset by the confession the following morning. He had not had much sleep because of it. Nonetheless, Mr. X ate breakfast with Mr. Morin that morning. He also engaged in horseplay with Mr. May, but denied that this was necessarily inconsistent with him being so upset. He asserted that his moods can change "pretty quick."

Mr. X did not tell any of the guards after he overheard the confession. He explained that he was upset and did not want to talk to anyone at that point. He could not explain why he never told a guard at any time. He told a guard that he had some information for the police. The first person he spoke to about the confession was Mr. May.

The prosecution at Mr. Morin's second trial tendered the evidence of two jail guards to speak to Mr. X's demeanour on the morning of July 1st. One guard testified that Mr. X approached him, shaking and crying, and asked him to contact Detective Fitzpatrick or Inspector Shephard. The guard added that X had behaved normally until that time. A second guard testified that Mr. X seemed a little nervous when they spoke that morning. The defence argued that Mr. X was upset because he was having marital problems, was in danger of losing his job, and was worried he would not be able to raise the down payment for a house he had contracted to buy.

July 1st Conversations Between May and X

Both informants testified that Mr. X approached Mr. May on the morning of July 1st and asked whether he had actually heard Mr. Morin confess the night before; May agreed that he had. Mr. X testified that he did not ask the question because he had some doubt about what he had heard, but rather because he was being cautious.

The two informants then discussed what they should do with their information. They agreed they should speak to the police. Mr. X testified that

he asked Mr. May who was handling the Jessop homicide investigation and May told him that it was Detective Fitzpatrick and Inspector Shephard. May suggested X contact Detective Fitzpatrick. Mr. May testified that he had read in the newspapers that Fitzpatrick and Shephard were the lead investigators on the case. The evidence before me disclosed that Detective Fitzpatrick and the informants had dealt with each other in the past. Fitzpatrick had arrested each of them on at least one prior occasion.

In his testimony before the Commission, Mr. May “assumed” that he and Mr. X spoke about the benefits they might be able to get from the police in exchange for their information, but he did not recall the details of what was said. Mr. X might have asked whether May thought he (Mr. X) could make a deal. Mr. May might have told X that he was going to try to barter his information.

In his testimony before the Commission, Mr. X did not recall whether he and Mr. May had talked about making a deal with the police, or the benefits they might obtain, or whether they should say something to the guards. He was confident, however, that he and Mr. May did not sort out how they were going to present themselves to the police.

July 1st Conversations with the Police

Conversations Between May and the Police

On the morning of July 1st, Mr. May asked to see either Inspector Shephard or Detective Fitzpatrick. He ended up speaking to Detective Doug King and Inspector Shephard. Mr. May acknowledged in his testimony before the Commission that he was hoping to obtain some sort of leniency from the police with respect to his outstanding charges. In his own words, he wanted “some charges dropped or time served.” He stated that he knew he had some information that the police would be interested in, and he tried to barter it for his own good. Inspector Shephard testified that in speaking to Mr. May, it was abundantly clear that May was trying to extract a benefit for his co-operation, and that *May was the kind of person in the kind of situation who would say anything to get out of that situation.*

To the officers’ credit, Mr. May’s conversation with the police was tape-recorded. Reference may be made to the transcript for detailed

information as to its content. Some examples of the type of statements made by Mr. May in his negotiations with the police follow. Mr. May made several statements demonstrating his desire to extract benefits for his evidence:

I would like something before I even sign anything or release any information.

.....

I want to try to get as much out of this as possible.

.....

I can give you whole — you know, anything you want to hear, right from the beginning, as a matter of fact.

.....

I'll give you a statement, a written statement. Anything you want. If you want me to go to court, I'll go to court, that's fine, but you know I'd like to get something out of it.

.....

I would like some type of arrangement made where I would get either time served, a very, very light sentence, or have some of my charges dropped anyway or something. Some reasonable deal worked out I mean, I think it's only fair. I mean, I helped you guys out, I would appreciate the same in return.

.....

[W]ell, I'd like to work something out where I could at least get a reduced sentence or get out of here before I give them any information, I said, before I sign anything, I want to be out of here. You know, get me off and I'll go to court, shit, I'll do what you want.

Mr. May made a number of other statements which invited scepticism. For example:

Q. What are you in for?

A. I was in for 2 counts of uttering a forged document, 2 Fail to Appear, 4 False Pretenses, and Accommodation Fraud. You know what, I had my (unintelligible) but *it was unintentional*, the uttering a Forged Documents (unintelligible) — you know, I told him I did it *but the false pretenses were totally unintentional* you know, and I told people that the cheques bounce. (sic.)

Q. So what did you get?

A. Six months.

.....

The guards ... set it up with one of the inmates that they had here, he was in here for rape or something and they set it up with them, and he beat the fuck out of me, knocked my teeth out, whatever and Booker had me up here. One of the guards that saw me last night talking to Morin, and he took me up here and said it's too bad they didn't carry you out in a pine box, they should have fucking killed you, you know, they were really giving me a hard time, and anyway, the whole thing.

.....

Q. [W]ould you consider a body pack or your cell wired and have Morin put back in with you?

A. Yeah, I'll do it but you know, sure I'll do it. If you want me to do it I'll do it. But as I said already, I don't know if he's going to go through the same shit again. Once is enough. (Emphasis added.)³

Mr. May also offered to provide testimony with respect to a second inmate:

³ Mr. May ultimately did agree to wear a body pack. A conversation between him and Mr. Morin was tape-recorded later that day.

Yeah, and I've got some other — you're going to be really interested in this, you know [name omitted] [who's] a real [con] artist in Oshawa. I have all kinds of goodies on him.

Conversations Between X and the Police

Mr. X also spoke to King and Shephard on July 1st. In his testimony before the Commission, Mr. X acknowledged that he wanted his freedom, and that he tried to use his information about the alleged confession for his "own leverage." He further acknowledged that his desires to save his marriage and buy a house probably partially motivated his communications with the police. Inspector Shephard testified that Mr. X made many statements which made it abundantly clear just how desperate he was to get out of jail.

Reference may be made to the relevant transcript for the details of Mr. X's conversation with the police. Some examples of statements made by Mr. X follow:

I'm shaking with disgust and I'm shaking with everything else. I've lost my job because I'm in here and they won't take me back on T.A.P and I've got some things going on the outside. I may lose my house and I broke down yesterday in church.

.....

Before I make any statement, any writing, anything I want out of here into the Halfway House.

.....

You get me out of here into a Halfway House I will give you a written statement, signed, I will appear in court, I'd give you anything, I got to get out of here, my nerves are shot.

Mr. X also made some statements which were less than credible. For example:

Q. What are you in here for?

A. Sexual Assault on a female 48 years old. She lived

down the hall from me. I've done a lot of bad things. There's ones with kids, sexually assaulting, that is and I wish to straighten out and I asked your partner there to try to get me out of here and into a Halfway House so I can try and get my job back. I'll give you anything you want. I got enough information.

.....

Q. Okay, and what was the sexual assault? What happened on that?

A. Well what happened was I was with her in the basement, and what happened was I walked her up to her apartment, she invited me in, okay and I started rubbing her back and she turned around and put her arms around me, we kissed, and my hand went down her pants and up her brassiere. She started pushing against me and of course I have no proof of this, my words against hers and I just said look just fucking plead guilty and get it over with cause it's almost a year and I don't want to live with it no more.

Q. And what did she say happened?

A. Well she said that I came up, I forced her back on the stairs put my hand in her pants, before that I turned her around, which is completely false, okay, she said I turned her around and started kissing her and then my hand went down her pants and up her top, and she told me no. She didn't say a fucking thing about no. Nothing. Okay, when I was under investigation, they said did she say no, I said no. As far as I know it could have been. But I wasn't in the right frame of mind so.

Q. Had you been drinking?

A. No I hadn't. But then I said yes, she did say no and I didn't stop. Or what was it, he said, did she say stop, I said, yes. He said, "did you stop." I said, "no." That's the way it went.

In yet another parallel to May's 'separate' interview, Mr. X also offered to provide testimony against inmates other than Mr. Morin, and indicated that he had tried to encourage another individual charged with

murder (R.M.) to confess:

I can even help you guys in on another case of pornography. It probably means dick because what the guy going to get for having pornography films. (sic)

.....

[R.M.], He's walking around all day, tears seem to be in his eyes, and I try to talk to him and I say, look man, if you've got something to say, let it out and — you know, maybe seek help. You will feel a lot better if you get it off your chest.

Mr. X advised the police that if he did not get something in return for his information, he would stay quiet and try to forget what he had heard:

I know enough okay, that I could put him [Morin] away for at least 25 years. I know that, okay. But, like, if I don't get out of here at least into that Halfway House I'm just going to have to live with it ... It's not going to be easy, but I'm going to have to try and forget that I even heard it.

Benefits Given to Mr. May

There was some dispute over the exact nature and extent of the benefits given to Mr. May, and over why they were given.

Benefits in Relation to Outstanding Charges

As noted above, in July, 1985, Mr. May was facing three criminal charges: escape custody, theft over \$200 and assault causing bodily harm. He had a bail hearing on these charges on August 19, 1985. Detective Fitzpatrick was present for that hearing. In cross-examination, Detective Fitzpatrick initially denied that his presence was part of the deal being given to Mr. May, *i.e.* that he was there to put in a good word for May. He insisted that he was there in case the acting Assistant Crown Attorney had any questions, and for "the cause of justice." Detective Fitzpatrick subsequently accepted that he was there because Mr. May wanted him to be there, and not for the cause of justice.

There is no dispute that because of Mr. May's cooperation, the escape custody and theft charges were withdrawn by the prosecution on August 23, 1985. On the same date, Mr. May entered a plea of guilty to the remaining charge of assault causing bodily harm. He was sentenced to serve 16 months in jail, to be followed by two years of probation.

Mr. May testified that as part of his deal with the authorities he avoided a lengthy sentence for the assault causing bodily harm charge. He agreed that the 16 month sentence was less than he expected to receive, and that he had been told he could get four to five years for attacking a jail guard. Mr. May later qualified his testimony by stating that he expected to receive more than 16 months for the assault because his father had told him he was charged with attempted murder. He also stated that in his conversations with the police on July 1st, he had been told that he was 'on his own' with respect to the assault charge.

Detective Fitzpatrick was cross-examined on why he had visited Mr. May at the Whitby Jail on three occasions from mid-July to mid-August, 1985. He did not specifically recall his reasons for visiting Mr. May, but agreed that they probably discussed the deal that Mr. May wanted for his cooperation. Inspector Shephard was also asked about the same visits, and responded that on most occasions Mr. May asked to see the police 'to find out what was going on in regards to the charges.' Neither officer made a record of the subject-matter of the visits.

John Scott, the Crown Attorney for the Region of Durham in 1985, authorized the deal with Mr. May. He testified that Mr. May was not granted any benefit in relation to his assault charge in exchange for his co-operation. But the Crown attorney who represented the Crown at Mr. May's sentencing hearing told the Court that Mr. Scott was trying to give Mr. May a great deal of consideration, and as part of that consideration the Crown was not seeking a penitentiary term or the maximum reformatory sentence for the assault. Mr. Scott pointed out that the Crown and defence did not present a joint submission. He also submitted that the sentencing judge's reasons demonstrate that he considered factors other than Mr. May's co-operation, including May's prospects for rehabilitation and the absence of concerns about specific deterrence.

It was suggested to Mr. Scott that the Crown not only sought a

reduced sentence for Mr. May's assault charge, but presented a diluted version of the facts. For instance, the court was not advised (1) that May assaulted the jail guard for the purpose of escaping; (2) of the facts behind the Whitby escape (the charge was just withdrawn); (3) that May had been engaged in a plot to escape from Penetang; and (4) of Penetang's opinion as to May's mental make-up (a personality disorder with narcissistic, aggressive and antisocial traits). Mr. Scott responded that it was not usual for the facts of a charge being withdrawn to be provided to the Court, that he was not aware of the plot to escape from Penetang, and that he does not think the Crown was aware of the details of Penetang's mental assessment of Mr. May — all they knew was that he had been remanded there for an assessment.

Mr. May felt that he did well by the deal. Detective Fitzpatrick offered the same opinion. Mr. Scott testified that, in reality, Mr. May had not been given very much. The escape custody charge was not a particularly serious charge, was not a question of 'overpowering or opening locks,' and was not an unusual event. Mr. Scott noted that the theft charge involved taking a car for a test drive and not returning it. Mr. Scott suggested that on a regular plea bargain he would have been prepared to drop the theft charge and might or might not have resisted withdrawing the escape charge, depending on the circumstances.

Mr. Scott also felt that the sentence of 16 months was appropriate for the assault offence. He acknowledged that the victim spent three days in hospital as a result, and that an operation to relieve pressure on his cranial nerve was considered. He pointed out that this information was provided by the Crown to the Court.

Benefits Relating to Parole

Mr. May was paroled within a week of testifying at the first trial, on the very first day he was eligible. In examination by Commission counsel, Detective Fitzpatrick accepted the suggestion that the authorities intervened to assist Mr. May in obtaining parole. His notes indicate that on December 11, 1985, Fitzpatrick spoke to Mr. May about parole, but he could not recall the details of the conversation. His notes further indicate that he and Mr. Scott visited Mr. May at the Millbrook jail on December 19, 1985. On that same date they spoke to the prison psychologist, Dr. Douglas Ford, about Mr. May. Detective Fitzpatrick testified as follows:

Q. And why were you and Mr. Scott then interviewing the psychologist at the jail in relation to Mr. May and whether he was to be recommended for release?

A. I believe on that occasion, the first trial was coming up in January, I believe, and we probably went up there for the Crown to do a pre-interview with Mr. May prior to trial commencing. And I can't recall how we came across the psychologist up there, but obviously, we did speak with him there, and obviously, we talked about him being released early if that was — he was going to recommend an early release on him.

Q. Were you fulfilling the police and the Crown's part of the deal with Mr. May for the cooperation Mr. May had shown?

A. Well, yes, I'm sure that was.

Detective Fitzpatrick added that he did not know whether it was part of Mr. May's deal that he would be released on parole, but said that "maybe he wanted an early release too, so we spoke to the psychiatrist or the psychologist concerning that."

In cross-examination, Detective Fitzpatrick changed his position on this issue. He testified that there was no deal offered to or made with Mr. May regarding early release, and that he had no involvement in May obtaining parole. The meeting with Dr. Ford was accidental, and the sole purpose for going to Millbrook was to conduct a pre-trial interview with Mr. May. He said it was possible that the only interest either the police or the Crown attorneys had in Mr. May's parole status was to keep abreast of his whereabouts.

Mr. Scott stated he did not have any role in the decision to grant Mr. May parole, and he was not aware of any role played by the police. He added that he was not surprised that Mr. May got released when he did "in light of the nature of that offender." When asked why he visited with Dr. Ford at Millbrook, he responded:

I think Detective Fitzpatrick is wrong in that regard.
My purpose in talking to the gentleman who was either

a psychologist or psychiatrist was to see how Mr. May was doing, to get some idea of how he was in terms of the institution, and get a feel for the individual. Mr. Ford was fairly positive in that regard. As well, we took a subpoena up to Mr. May, I believe, on that date, and served him with a subpoena.

Mr. Scott brought the subpoena because he was concerned that Mr. May would be paroled before trial.

Inspector Shephard testified that neither he nor (to the best of his knowledge) Detective Fitzpatrick offered Mr. May any deal with respect to parole, or made any efforts to assist Mr. May in obtaining parole. Inspector Shephard was cross-examined on some of his notes which potentially related to Mr. May's parole. The contents of his various notes are reflected in the table below.

Date	Notation
December 3, 1985	"Spoke to Pauline Scott, Ontario Parole Services re: Robert May. Advised Pickering Parole Service would be looking after him. Due to record and occurrence, unlikely parole first time up."
December 10, 1985	"Spoke to Cooler Parole Services re: Robert May."
December 11, 1985	"Spoke to Robert Dean May re: prison, Millbrook, Whitby, parole. Jail guards, et cetera."
December 12, 1985	"Spoke to Kerry Clark, superintendent, Whitby Jail."
December 19, 1985	"Spoke to Douglas Ford, psychologist."
December 19, 1985	"Telephone Greg Whitehouse, family counselling, Peterborough, would recommend parole for May."

Inspector Shephard testified that his contacts with Mr. Clark and Dr. Ford had nothing to do with Mr. May's parole. His explanation for his contacts with parole authorities was that he was attempting to find out when Mr. May was going to be released so he could keep abreast of his whereabouts pending Mr. Morin's trial. He did not know of any other way to obtain the information, and did not intend to communicate to the parole authorities that he was interested in seeing Mr. May obtain parole.

The Reason for the Deal with May

Both informants were cross-examined at both trials on the basis that they had traded their information and testimony for the benefits they received or were promised. Mr. Scott, however, offered a different view as to why benefits were given to Mr. May. He said it was in exchange for Mr. May agreeing to wear a tape recording device (a 'body pack') during a conversation with Mr. Morin in order to obtain corroborative evidence of the confession. They were not given in exchange for Mr. May's information or testimony.

Mr. Scott stated that the prosecution had no need to exchange benefits for a formal statement or testimony by Mr. May since he had already disclosed his information during his July 1st tape-recorded conversations with the police. If necessary, he could be subpoenaed to court and cross-examined on the tape recording of his conversation. Mr. Scott did ultimately agree, however, that Mr. May's formal statement was an important document. He said:

It certainly would be an important document if you did not have the same things on the recording. It remains an important document because it is easier to refresh a person's memory from a written document than it is to play the tapes for individuals for that purpose.

Mr. Scott also conceded that at the time he authorized the deal with Mr. May he had not listened to the July 1st tape-recording to see how well it documented the confession.

Subsequent Benefits

Evidence was adduced before the Commission of contact between Mr. May and the public authorities after the second trial in which Mr. May sought assistance on various matters. Mr. May testified that he hoped he could extract further benefits because of his co-operation in Mr. Morin's case:

Q. And I take it, having regard to what you did for them, and I'm talking about the police and the Crowns, you hoped that the police and the Crowns including Mr. McGuigan would help you out in the future; right?

A. I did.

It is clear from the evidence that Mr. May contacted Detective Fitzpatrick at his home in Newfoundland in late 1993. Mr. May testified that his girlfriend, Kathy Mutch, had read Kirk Makin's book on Mr. Morin's case, *Redrum the Innocent*.⁴ The book refers to the opinions of various psychiatrists as to Mr. May's mental make-up (they called him a liar and a sociopath). Mr. May testified that problems arose in his relationship with Ms. Mutch after she read those opinions, so he asked her if she would feel better if she spoke to someone who was involved in the case. She said she would, and that's why he contacted Detective Fitzpatrick.

Mr. May said he wanted Detective Fitzpatrick to explain the psychiatric aspects of the book to Ms. Mutch. Detective Fitzpatrick testified that Mr. May asked him to advise Ms. Mutch that the psychiatric evidence was 'no big deal,' and that it was just a student who gave the evidence. Detective Fitzpatrick agreed to speak to Ms. Mutch if she called him. She never did.

Both Mr. May and Detective Fitzpatrick were asked why they would be interacting in this way. Mr. May testified:

Q. Why would you feel you had that right or that privilege to phone him?

A. It's difficult to explain. I really don't know myself.

Q. Why did you think he would help you, the trial was over? Why would he help you, you in British Columbia?

A. I really don't know.

Q. Well why would he give you his home telephone number? Trial was over.

A. You would have to ask Mr. Fitzpatrick then.

⁴ *Redrum the Innocent: The Murder of Christine Jessop and the Controversial Conviction of her Next-Door Neighbour, Guy Paul Morin* (Penguin Books, 1992: Toronto).

Detective Fitzpatrick testified:

Q. So why would you, please tell us, agree to help Mr. May after the second trial by explaining to his former girlfriend, Kathy Mutch, that: Well, the psychiatric evidence that's disturbing you isn't so much, it was just students. Why would you do that?

A. I don't know, sir. He called me, and I agreed to do it.

Q. Why did you give him your home telephone number?

A. No particular reason, sir.

Q. Did you have any obligation to Mr. May?

A. No, sir.

Q. What were you going to tell Kathy Mutch if she phoned?

A. I have no idea, sir.

Detective Fitzpatrick testified that Mr. May also contacted him on two other occasions, although he gave no indication that Mr. May ever requested any benefit during these contacts. On the first occasion, Mr. May telephoned him early in the morning and made a threat against a person in British Columbia. Detective Fitzpatrick responded by telling the local R.C.M.P. in British Columbia. On the second occasion, Mr. May dropped in, uninvited, to the police station where Detective Fitzpatrick was working. They had a brief conversation about May's schooling and family. Mr. May accepted that he contacted Detective Fitzpatrick on these occasions, but could give no evidence as to the content of their conversations.

In the late summer of 1994, Mr. May contacted both Alex Smith and Leo McGuigan. Mr. May had been charged with several new criminal offences in British Columbia (including criminal harassment and uttering a death threat). He contacted Mr. Smith first. Mr. Smith recounted the conversation:

A. Mr. May called me at my office, spoke to me about the circumstances of his arrest.

Basically, the theme of the conversation was that the charges were exaggerated, that he wasn't really stalking anyone, or anything like that. Frankly, I don't recall Mr. May indicating in any concrete terms, why he had called me. I mean, it's obviously clear to me that he was looking for help.

In any event, at the end of the conversation, I suggested to him that he should have his lawyer call Mr. McGuigan — and I may have said, have your lawyer Mr. McGuigan or myself, one or the other, and that was the end of the conversation.

Q. Call Mr. McGuigan or yourself with a view to doing what?

A. Well, first of all, he hadn't sought any help. Secondly, it's not clear to me that either Mr. McGuigan or myself would have been in a position to help him, had we wanted to. I mean, the only reason I say he was calling to seek help is because I'm not naive enough to think that Mr. May called me up because he wanted to have a chat.

I mean, I assume that he was self-motivated when he called. We never talked about the details of what he wanted. I know he subsequently talked to Mr. McGuigan about calling the Crown attorney out there. He didn't have that conversation with me and we never got to the point where he asked me to help him.

Mr. May testified that he contacted Mr. McGuigan several times at his home and office concerning the charges in British Columbia. He was seeking help with the charges, and he asked Mr. McGuigan whether he would call the Crown attorney in British Columbia and put in a good word for him. Mr. McGuigan responded that he would contact the Crown, but could not make any promises. Mr. May felt that Messrs. Smith and McGuigan were both "more than ready" to help him out.

Benefits Given to Mr. X

Benefits Before the First Trial

Mr. X testified that he tried to obtain benefits (release from custody) in exchange for his information about Mr. Morin, but failed to receive any. He was never released on TAP. He did not get out of jail early. He provided his information to the police when he spoke to them on July 1, 1985, after they promised to speak to Mr. Scott about his demands. He provided a written statement on July 3rd, still hoping that the police would help him obtain his release.

Mr. Scott testified that Inspector Shephard telephoned him on July 1st to advise him of the information Messrs. May and X had to offer. He stated that all the discussions about a deal focused exclusively on Mr. May. He did not recall any discussions about benefits for Mr. X. He was not even sure that he was informed of Mr. X's demands.

Mr. Scott felt that corroboration of Mr. May's evidence might be of value. He believed that the July 1st tape recording of Mr. X's conversation with the police already provided some corroboration, but agreed that he did not know how accurate or specific the tape was about the confession.

Mr. Scott suggested that he did not need to negotiate with Mr. X because he had a tape recording of Mr. X's July 1st conversation with the police. On the basis of the transcript, he could have forced Mr. X to testify. Mr. Scott acknowledged that he would normally prefer a co-operative witness, but suggested that with inmate witnesses it is sometimes better to cross-examine them as involuntary witnesses since it takes some of the taint away from them. He agreed, however, that cross-examining your own witness is an unusual procedure. He also agreed that it is valuable to have a written statement from a witness.

Initially, Mr. Scott did not reject the possibility that he had authorized police assistance with Mr. X's efforts to obtain early release. He testified about his conversation with Inspector Shephard on July 1st:

Q. So would you agree with me that it's likely that you said: Look, see what you can do with Mr. X. We'd

love to get a statement from him; it'll help. See if you can help him with a halfway house, if you can. Is that likely what went on, or ... ?

A. I don't recall that going on, but — you know, I don't want to eliminate it ...

Subsequently in his testimony Mr. Scott repeatedly stated that he had no involvement in Mr. X's efforts to obtain TAP, nor did he instruct any police officer to assist him in that regard. Mr. Scott was aware that Inspector Shephard had made some phone calls to assist Mr. X with TAP, but insisted that Inspector Shephard was not acting under his supervision. This is what he said:

Well, sir, I think if you go back to the transcript relating to Mr. X's sentence, the judge directs that he be put in the temporary absence program, and directs that he be sent to a certain facility. The officer may have made calls to try and put that part of the judge's plan into effect, but it has no involvement with me because the judge has made the decision, and it's clear in the transcript.

Mr. Scott accepted, however, that Inspector Shephard "would not have made the calls if Mr. X were not co-operating by providing information."

Inspector Shephard testified as follows regarding his role in assisting Mr. X with TAP:

Q. And, as well, apart from seeing Mr. May and apart from seeing Mr. X at the Whitby jail, you made various attendances upon Mr. X's employer, upon parole individuals, jail authorities dealing with Mr. X's temporary absence parole. Am I right as to that?

A. Yes, sir.

Q. All right. And that was done with a view to do what? To doing what?

A. A view of having him put on TAP so that he could return to his job at the Ontario Hydro.

Q. Which was one of the things that he was seeking to obtain as a benefit for his cooperation, is that fair?

A. That's correct.

Detective Fitzpatrick testified that there was an attempt to look after Mr. X. His recollection was not clear on the issue, but he believed that the police tried to get Mr. X into a halfway house.

Benefits After the First Trial

In 1987, Mr. X was charged with sexual assault. He testified that on the day of his arrest, Detective Fitzpatrick told him that he was 'on his own.'⁵ Mr. X agreed that it was possible he contacted a Crown attorney or a police officer involved in the *Morin* case about his charge. He later stated that both Ms. MacLean and Mr. Scott told him they could not help him. Mr. Scott testified that he was contacted by Mr. Brown, the Crown attorney who was prosecuting the charge. Mr. Brown indicated that he had been asked by counsel for Mr. X to speak to Mr. Scott about Mr. X's co-operation. Mr. Scott responded that he would not play any part in decisions regarding the trial of or penalty for the offence. When Mr. X was sentenced for the offence, the Crown attorney submitted to the Court that Mr. X be given absolutely no credit for his testimony in Mr. Morin's case.

Benefits After the Second Trial

In 1994 Mr. X was charged with communicating for the purpose of prostitution. Mr. X said he contacted Messrs. Smith, McGuigan and Scott in connection with this charge. He acknowledged that he was probably contacting them to call in favours. As for whether this type of contact was invited, Mr. X had this to say:

Q. [D]id Messrs. Scott, Smith, McGuigan, Fitzpatrick or Shephard ever imply to you, after the second trial, that you could contact them if you ever needed them?

A. I don't recall.

⁵ Detective Fitzpatrick testified that he had no involvement with Mr. X's charge whatsoever.

Q. Is it possible that they may have implied that?

A. They may have, I don't recall.

Mr. X testified that he was concerned over the fact that the Crown was asking for a jail sentence instead of a fine for his crime. He contacted Mr. Smith and asked him 'what was going on.' He contacted Mr. Scott and asked him 'why they were asking for a jail sentence.' He was of the impression that Mr. McGuigan got involved through Mr. Smith. Mr. Smith responded that he would look into the matter, and subsequently advised Mr. X that they would bring in another (senior) Crown attorney to deal with the charge. In the end, Mr. X was sentenced to a \$150 fine.

Mr. Smith described his involvement as follows:

Q. Did you speak with Mr. X, post-conviction?

A. I did speak to Mr. X. The timing is less clear. It certainly would have been in 1994 and it would have been earlier in 1994, so I suspect, sort of the spring, early summer, but I'm not clear on the precise time. Mr. X called me again at my office and indicated that he had been charged with communicating for the purpose of prostitution.

The ... his call, as I recall it, was he'd indicated that he had received a screening form that indicated the Crown was asking for a custodial sentence. And he had indicated to me that he was guilty of the charge, that he wanted to plead guilty, but couldn't believe that the Crown was asking for jail because everyone else was getting fines ... My response to him was, people don't go to jail for communicating for the purpose of prostitution. And I can't remember exactly what he asked of me. My recollection is that he asked me not if I could do anything, but he asked me if I could find out whether the Crown was serious about wanting jail. Now, again, I'm not naive enough to think that Mr. X would not have perhaps hoped that that would in some way benefit him.

But in any event, my recollection is that I called the duty Crown, whoever that was, and discussed with them the position on the screening form. My

recollection is that they confirmed that the Crown had screened for jail, and I don't specifically remember calling John Scott, but I'm quite certain that I did call John Scott, and passed along the information that Mr. X had told me he wanted to plead guilty to this charge.

But, what surprised me, the Crown was asking for jail and is the Crown serious about asking for jail? I'm sure that I expressed both to the duty Crown and to John Scott, the same incredulity, that people don't go to jail for communicating because that, frankly, was my belief. My recollection as to why Mr. X told me he was calling me was that he said he couldn't afford a lawyer, and so wanted to plead guilty through a duty counsel.

I don't have any clear recollection of what ultimately happened ... I have some vague recollection that ultimately the position taken by the Crown was that Mr. X should receive a fine. My recollection is that the position taken by the Crown was that he should receive a somewhat higher fine that he got, but that's all very vague.

I frankly, had no first-hand dealing with the matter after calling John Scott, and that's assuming that I did call John Scott.

Mr. Smith testified that he did not know whether or not his intervention assisted Mr. X, but conceded that it might have had an impact.

Mr. Scott testified as follows:

I did receive a phone call from, I think, Mr. Smith, relating to that matter ... [I]t strikes me that it would have been in '94 or '95 ... Mr. Smith called and asked about a screening for him. That indicated the Crown would seek a jail term on a charge of that kind ... And I said I don't know about the screening for him, I'm not going to become involved in it. I'll turn you over to a screening Crown who can address the matter. And I did.

Mr. Scott indicated that he did not speak to the screening Crown himself. He tried to avoid becoming involved in matters concerning either

Mr. May or Mr. X since his dealings with them. He believed that Mr. Smith's inquiry was inspired by a desire to gather information rather than an attempt to assist Mr. X, but conceded that the latter was possible. Mr. Scott stated that he never dealt with Mr. X himself.

Mr. McGuigan testified that he had no involvement in any of Mr. X's charges. (Mr. Smith never stated that he spoke to Mr. McGuigan about Mr. X's communicating charge.)

Mr. X stated that it was possible he contacted the Crown or the police about other matters, but he did not know for sure. He did indicate that he once contacted Sergeant Chapman, the court officer for the second trial, about someone in his union running a CPIC check on him.⁶ Chapman confirmed that he spoke to Mr. X about why someone had access to his criminal record. Mr. McGuigan testified that he was asked by Mr. X to do something about someone improperly using the criminal record. Both Mr. X and Inspector Shephard testified that they encountered each other at a public swimming pool one day, but neither suggested that this was anything but accidental. Mr. X also encountered Detective Fitzpatrick at his (Mr. X's) place of work on a few occasions. Mr. X testified that he worked at a place that is routinely used by the average homeowner, and he had no reason to believe that Detective Fitzpatrick came in for the purpose of speaking to him. On one occasion they spoke about Mr. May's recantations. Detective Fitzpatrick confirmed that he had seen Mr. X at his workplace on a few occasions, and that their encounters were entirely unrelated to the Morin prosecution.

May's Recantations and Allegations

After the second trial, Mr. May made a number of out-of-court statements regarding the Morin prosecution. He told a number of people that he lied about hearing Mr. Morin confess, and he made allegations of serious misconduct by some of the individuals involved in the Morin investigation and prosecution. In his testimony before the Commission, Mr. May asserted that these statements were untrue.

Kathy Mutch was Mr. May's girlfriend in the early 1990s. Susan

⁶ CPIC is the computerized police information database.

Mutch was her sister-in-law. Daryl Thompson was an old friend of Mr. May. Mr. May testified:

Q. Did you tell Susan Mutch that you had committed perjury at Guy Paul Morin's trial?

A. I did.

Q. About the confession?

A. I believe I did.

Q. Yes. Now did you tell a person by the name of Kathy Mutch that you'd perjured yourself at Guy Paul Morin's trial?

A. I didn't.

.....

Q. And did you tell a fellow by the name of Daryl Thompson that you'd perjured yourself at Guy Paul Morin's trial by stating that he confessed to you?

A. I believe so.

In his evidence before the Commission, Mr. May stated that he lied whenever he said that he had perjured himself.

Mr. May was asked about a phone call that was overheard by Kathy and Susan Mutch:

Q. Now Susan Mutch in an affidavit says she heard you in a phone call in September '93 saying, "People, I understand you're looking for me" — this is out in British Columbia — "and you want me back there." And later, "There's no way I'm going to take the fall for this alone." You said he was not going to let other people back out and blame Bob, because the other person was in on it, too. Did you make such a phone call?

A. I may have, I don't recall.

Q. Yes. Who were you talking to?

A. Nobody.

Q. Talking to yourself?

A. I was.

Q. And Susan Mutch happened to overhear you on the phone talking to yourself?

A. That's correct.

Q. Okay, we have your evidence. Kathy Mutch says she overheard you say that "He was not going down alone, and that if he took the rap on this, you guys are going with me." Now did you make that conversation such that Kathy Mutch overheard you?

A. I may have, yes.

Q. Yes. And you told Kathy Mutch that you were talking to the police in Ontario?

A. I don't recall. I may have, yes.

Mr. May was asked what he meant when he said "I'm not going down alone, and if I take the rap, you guys are coming with me." He responded that he was in "a bit of a tailspin" when he said those words, and he does not know what was going through his mind. Mr. May was also asked about his evidence that he was talking to himself. He said that he dialed Durham Regional Police, but hung up as soon as someone answered. He was confronted by the fact that Susan Mutch's phone records show that there were two phone calls to the police, one lasting four minutes and the other lasting two minutes. To the suggestion that this shows he did not hang up once someone answered, but rather spoke to someone on the other end, Mr. May responded that he does not recall speaking to anyone. Mr. May later stated that he may have been trying to contact Detective Fitzpatrick about the Morin trial.

Mr. May was asked about his conversations with Susan Mutch:

Q. Did you tell her that you'd made a deal for your testimony in Guy Paul Morin's case? Did you tell her that September 23rd, 1993?

A. I don't recall, sir.

Q. Did you tell her that you were angry, and as a result, the police officer had been promoted, and that you'd ... a bad reputation and might go to jail?

A. I might have, I don't remember.

Q. Did you tell her that you and Bernie Fitzpatrick were friends in a weird kind of way because Fitzpatrick had arrested you so many times and known you such a long time?

A. I may have.

Q. Did you tell Susan Mutch and laughed with her about it, how you'd fooled the jury into thinking you changed your lifestyle when you were regularly dealing drugs?

A. I don't believe so.

.....

Q. Can you say that you didn't?

A. No, I can't.

Mr. May believed he did tell Kathy Mutch that he was paid \$25,000 for his evidence at Mr. Morin's trial.

Mr. May was questioned about two conversations he allegedly had with Mr. Thompson. The first was in June, 1994:

Q. He asked you if you'd lied at the trial, and he's dealing with Morin's trial. And you said, "Yes, I made a deal with the devil and now have to live with it," and that an innocent man was in jail. You told Daryl Thompson that?

A. I believe so.

Q. Yes. Thank you. On July the 7th, 1994, did you phone Daryl Thompson from your parents' home and say to Daryl that everything you said at Guy Paul

Morin's trial was a lie, that you'd perjured yourself to avoid a lengthy sentence for assaulting a jail guard?

A. I may have. I don't recall.

Mr. May was also asked about a similar conversation with Susan Mutch:

Q. Okay. And as to Susan Mutch on July the 5th, 1994, did you tell her that you cut a deal with the devil, and the devil's come calling, and that what we're dealing with here is coercions, false witnesses, fabricated evidence and destroyed evidence?

A. I might have.

Mr. May later denied that he had made a deal with the devil.

Mr. May had a conversation with his father in July, 1994:

Q. And did you say to him during a conversation in the back yard that you'd perjured yourself at the Morin trial when you said that Morin had confessed, and that if you were found out, you could go to jail for ten years?

A. I may have. I don't recall the conversation.

.....

Q. Is your father a truthful man?

A. He is, yes.

Q. Did you tell your father on that occasion that you'd made a deal to be a witness because you were being assaulted by guards at the Whitby Jail?

A. I may have.

.....

Q. Did you tell your father you'd been keeping a secret for ten years and couldn't keep it any longer?

A. I may have.

On July 7, 1994, Mr. May had a conversation with his mother:

Q. Did you tell her — your mother — that you lied at Guy Paul Morin's trial by claiming that Guy Paul Morin confessed to you the murder of Christine Jessop?

A. I may have.

Q. You may have said that to her; all right. And did you tell her that you made up this confession because you were being assaulted by guards at the jail?

A. I may have.

Q. Did you tell her that you'd had a broomstick inserted in your behind, and you would have done anything to stop the assaults?

A. I believe so.

Q. Did you tell her — your mother — that the assaults had stopped once you told the police that Morin had confessed?

A. I believe I did.

Q. Did you tell her that Bernie Fitzpatrick had visited you at the jail and told you to dance around with Morin, and not come out directly and ask him if he killed the Jessop girl?

A. I might have, yes.

Q. You might have told her that. Did you tell her that you'd been threatened personally by Detective Fitzpatrick on numerous occasions?

A. I believe so.

Q. And that the threats had also been directed at your wife and children, and the May family as a whole?

A. I believe so.

Mr. May's mother suggested that he write down his allegations in a letter in case something happened to him. He did so in a letter dated July 7, 1994:

In June of 1985, I was approached by Det. Bernie Fitzpatrick of the Durham Regional Police force. This occurred one day before my talk with police about Guy Paul Morin confessing to me at Whitby County Jail. The discussion I had with Fitzpatrick consisted of a deal the police wanted to give me in exchange for testifying against Morin. The deal was that I would wear a wire and dance around Morin's alibi. But never to directly ask him about the murder. I was to find somebody who would corroborate my testimony and they to (sic) would be looked after. I was told that in exchange for my help, police would give me short time and would parole me immediately after I testified. I have specific information that could lead to the arrest of the top level officers involved in the case for fabricating evidence, perjury, destruction of evidence, coercion, and threatening. To my knowledge, Guy Paul Morin is an innocent man. In the event of my death or disappearance I would like the following to be released to the public.

The page missing from the jail log was removed to hide the fact that I was approached by police one day before I was to confess. Det. Michael Michalowsky was threatened because he had knowledge that could blow the case. This is why he kept two notebooks. I know this because Bernie Fitzpatrick let it slip while drinking with me at his condominium in London Ont. during the second trial. Ever since the first trial, I have been threatened to keep my mouth shut by telling me that my family was in danger. I am now worried that my ex-girlfriend may be in danger because Bernie Fitzpatrick feels she may know too much. He has implied that she could have an "accident". I am concerned for the safety of my family and friends. This should be enough information to start an investigation. I will in the future if need be, provide dates and specific information concerning the conspiracy to convict Morin.

Dated and signed in Whitby, Ont. on July 7/94 at 10:12 am.

This is a list of names of the officials involved in the conspiracy to convict Morin:

Bernie Fitzpatrick, Alex Smith, Robert Chapman, Leo McGuigan, John Shephard.

Send this to:

Mark (sic) Makin - Globe and Mail
Eric Manning - The Fifth Estate
Peter Cheney - The Toronto Star

Dated this day July 7/1994 in Whitby, Ont. 10:25 a.m.

May's Explanations

As stated above, Mr. May denied that his recantations were true. He offered two explanations for why he made them. First of all, Mr. May said that he did so in order to scare Kathy Mutch, his former girlfriend, into contacting him. Mr. May explained this as follows:

Q. So why would you tell Judy Mutch that you perjured yourself at the Morin trial if, as you tell us today it wasn't true?

A. I was trying to convey a message to Kathy through people that she knew to try and scare her so that I could make contact with her. She refused to have contact with me at that time.

Q. I don't quite understand that. Maybe you can help us. You told Judy Mutch that you'd perjured yourself when you swore at the trial that Guy Paul Morin had confessed because you hoped that would scare Kathy, her sister, in some way? I don't quite understand; maybe you can help us.

A. It was part and parcel of the story that I was telling everybody, that she was in danger because Bernie thought she knew too much, and so on and so forth, and I figured if she was scared enough, she might try to contact me or talk to me so that — you know, she would remove, or could remove herself from the situation.

In his letter to his mother, Mr. May wrote that he was worried that his "ex-girlfriend may be in danger because Bernie Fitzpatrick feels she may know too much. He has implied she could have an accident."

Mr. May admitted that this explanation was convoluted and did not make much sense. In particular, he could offer no explanation for why he privately told his family doctor, a person with no connection with Kathy Mutch, that he had perjured himself. He also acknowledged that his telephone conversation with no one, overheard by Susan Mutch, occurred nine months before his relationship with Kathy Mutch ended.

Mr. May's second explanation for making false statements was that he had been abusing drugs and alcohol at the time he made them; he had been on a sedative called Xanax when he lied to his parents. His mother swore an affidavit in which she stated that her son appeared to be sober when he made his statements to her. Mr. May explained that his parents had never noticed him being under the influence of intoxicants, even though he had been in their home many times after having taken drugs. When confronted with an affidavit from his doctor who also regarded him to be sober, Mr. May responded that he used eye drops to take the redness out of his eyes.

May's Recantations of his Recantations

Mr. May had denied the truth of his recanting statements in advance of his testimony before the Commission. On August 17, 1994, an article appeared in the *Toronto Globe and Mail* reporting on Mr. May's claims that he had perjured himself at Mr. Morin's trials. Mr. May had attempted, by threats and violence, to dissuade the Mutchs and Mr. Thompson from disclosing his recantations, but was unsuccessful in doing so. Mr. May testified before the Commission that he feared he would be charged with perjury as a result of this publicity, so he gave a television interview in which he claimed that the Mutchs and Mr. Thompson were lying about his recantations. He alleged that Judy Mutch was mad because he had hurt her sister, and Thompson was mad because May had called him a homosexual. He also contacted Mr. McGuigan and assured him that he did not lie at Mr. Morin's second trial. He advised others, including Metro Toronto police officers, of the same thing. Mr. May subsequently acknowledged, during the course of Mr. Morin's appeal proceedings as well as before the Commission, that he had actually made the statements which Thompson and the Mutchs

attributed to him.⁷

Guy Paul Morin testified at both trials and at this Inquiry that he was not responsible for the killing of Christine Jessop and that he did not confess to Robert Dean May. I accept these statements completely.

Findings

My mandate does not permit me to determine whether Mr. May and Mr. X perjured themselves at Mr. Morin's trials. I do find, however, that on the evidence before me, Robert Dean May and Mr. X are totally unreliable witnesses. Further, they did not report the purported confession to the authorities because of their moral outrage at the crime committed by Mr. Morin. I do not accept that explanation; their motives were self-serving. I find their evidence unreliable for many reasons. Some follow:

Mr. May has a criminal record for crimes of dishonesty. He admitted that he had a problem with lying in the past and that he had lied to the police and correctional authorities. He wanted badly to be released from jail in June, 1985 and would do whatever was necessary to accomplish this. During his negotiations with the police for the information he said he had about Morin's confession, he told them (on tape) that he would give them anything they wanted in exchange for the authorities' assistance with his outstanding charges.

May was diagnosed by mental health experts at the second trial as a pathological liar. He had a deficient social conscience and was skilled in deceiving others. After the second trial, May recanted his trial evidence. He told a number of people that he had lied about having heard Mr. Morin confess and that he had committed perjury at the trials. Subsequently, May publicly alleged that those people were lying when they came forward with his recantations. Later, May retracted his allegations against those people and agreed he had fabricated them. Then he attempted to recant his recantations and took the position that his evidence at the trial about the purported confession was indeed true. I find that May spun a web of confusion and

⁷ Mr. May explained to the Commission that he was forced into acknowledging this when his letter to his mother appeared in the public forum.

deceit around the issue of the confession. He is too unreliable a person to be believed as a witness on the issues to which he has testified before me.

Mr. X has a lengthy criminal record for sexual offences, particularly for offences against young children. He was diagnosed in 1988 as having a personality disorder with sociopathic tendencies. At the second trial of Mr. Morin an expert testified that this is characterized by exaggeration, lying, suggestibility and disregard for social norms. Another expert said Mr. X would have been strongly influenced and recruited by a stronger person like Mr. May. Mr. X agreed that he has lied to the police and correctional authorities in the past. He told this Inquiry that at times he apparently lost contact with reality; he has heard voices in his head which, sometimes, were so loud that he thought his head was going to explode. He explained his history of sexual misconduct by the fact that he heard the voice of his uncle telling him to commit the illegal acts. X also bargained with the police for his information about Morin's purported confession. In June, 1985, X was desperate to get out of the Whitby Jail and into the Temporary Absence Program. He told the police he would give them anything they wanted if they got him into a halfway house. However, if he did not get something in exchange for his information, he would stay quiet and try to forget what he had heard about Morin's purported confession. After the first trial he was convicted of another sexual assault. He, too, is an untrustworthy person whose testimony cannot be accepted on any of the issues that arise before me.

Other aspects of the evidence which further undermine the reliability of these witnesses are reflected throughout the balance of this chapter. These aspects parallel those found in other miscarriages of justice involving jailhouse informants.

An issue canvassed by some counsel during the course of the Inquiry was the response of the various authorities upon learning of Mr. May's recantations (and statements subsequent thereto). Mr. Morin was appealing his conviction at the time, and eventually sought to introduce fresh evidence on the appeal concerning Mr. May's recantations. As such, it was argued, any evidence pertaining to the recantations may have had an impact on the appeal.

Detective Fitzpatrick testified that in the summer of 1994 he learned of Mr. May's recantations as well as a threat on his son's life by Mr. May. He

did not report either matter to the Crown attorneys with carriage of the appeal. He felt that he was retired and had no obligation to pass on this information. He also noted that there were two Metro Toronto police officers assigned to deal with the disclosure issues pending appeal.

Mr. Smith was contacted by Mr. May shortly after the recantations became public. Mr. May advised him that his friends were lying. Mr. Smith subsequently learned that Mr. May was lying. Mr. Smith testified that he did not think to notify the Crown attorneys with carriage of the appeal about this information. He agreed that, in retrospect, he should have been more careful and disclosed the information.

Inspector Shephard testified that after he learned of Mr. May's recantations he telephoned the Deputy Chief of Police and suggested that someone investigate the issue. Inspector Shephard felt that he had a duty to pass on the information, as it was relevant to the issue of whether Mr. May was a reformed individual (as he had professed to be at the second trial).

Detective Fitzpatrick's failure to notify police officials of the two events, and Mr. Smith's failure to contact the Crown attorneys with carriage of the appeal, demonstrate a serious flaw in the system. It may well be that Detective Fitzpatrick, by then retired, felt that matters were well in hand and that he wanted no further involvement in the case. Still, as a former police officer, he should have realized the possible importance of these events and passed them on, although I acknowledge that he was under no obligation to do so.

Insofar as Mr. Smith is concerned, he agreed that this was an error of judgment, and I accept that this was not a malicious omission. His inaction does, however, indicate that guidelines are necessary to ensure proper co-operation between trial Crowns and those in charge of the appeal. My recommendations address this issue.

(iii) Set-Up

In his testimony before the Commission, Mr. May not only denied the truth of any of his recantations, he also denied any knowledge of any wrongdoing on the part of the investigators and prosecutors in Mr. Morin's case. As reflected above, after the second trial Mr. May made a series of

incriminatory statements regarding the conduct of the authorities, and particularly the conduct of Detective Fitzpatrick. He alleged that there had been a conspiracy to convict Mr. Morin. More particularly, he alleged, *inter alia*, that he had been visited by Detective Fitzpatrick on the day prior to overhearing Mr. Morin confess, that Detective Fitzpatrick had encouraged him to fabricate a confession by Mr. Morin and find another inmate to corroborate the story, and that Detective Fitzpatrick had engaged in a cover-up of his improper activities, involving the destruction of evidence and intimidation of potential witnesses.

Detective Fitzpatrick was questioned about Mr. May's allegations, and categorically stated that they were false. Mr. McGuigan denied that there was any conspiracy to convict Mr. Morin, as had been alleged by Mr. May in his recantations.⁸ The Commission heard further evidence to determine whether there was any truth to the allegations, particularly the suggestion that the informants' evidence was the product of a set-up. Ultimately, counsel for the Morins conceded that the evidence was insufficient to permit me to find any set-up. I agree. However, given the public attention directed to this issue (and the systemic recommendations which also arise from this issue), it is necessary to review the relevant evidence.

Prior Association between Fitzpatrick and May

Mr. May testified that Detective Fitzpatrick had been the arresting officer on all of his criminal charges prior to 1985, except for the assault on the prison guard. He acknowledged that he may have once told Susan Mutch that he and Fitzpatrick were friends "in a weird kind of way" because Fitzpatrick had arrested him so many times. He further acknowledged that he may have told Mr. Thompson that Detective Fitzpatrick was a friend who would always look after him. In his testimony before the Commission, Mr. May denied that he had any special relationship with Detective Fitzpatrick that would lead him to believe that Fitzpatrick would look after him if he had a problem. When asked how he had looked upon Detective Fitzpatrick in 1985, Mr. May responded that he did not have "much use for him."

Detective Fitzpatrick testified that he was not Mr. May's friend, and

⁸ The allegation was contained in May's letter to his mother of July 7, 1994.

that they had no relationship at all. He stated that his only contact with May prior to July 9, 1985, was when he arrested him on his 1981 break and enter and theft charges.

Prior Association between Fitzpatrick and X

Mr. X testified that he had been arrested and/or investigated by Detective Fitzpatrick on at least two or three prior occasions. He agreed that he knew Fitzpatrick quite well, but added that this was only through dealings with him on criminal charges.

Detective Fitzpatrick testified that his only prior association with X was when he arrested him for sexual assault in 1984; he was the officer-in-charge of that prosecution. He had no other contact with X, nor did he know of his reputation amongst the Durham police officers.

Fitzpatrick's Alleged Visit to May on June 29-30, 1985

As reflected above, Mr. May at one point told his mother that he had been visited by Detective Fitzpatrick in the days immediately prior to July 1, 1985 (the date on which he allegedly overheard Mr. Morin confess) and that the record reflecting that visit had been destroyed by Fitzpatrick. No professional visitors' records for the Whitby Jail for June 29 and 30, 1985, could be found by the time of this Commission. An issue canvassed during the hearings was whether those records were destroyed or removed so as to conceal a visit to Mr. May on one of those days. The evidence pertaining to this issue will be addressed below.

The only available record was the Corridor 1 Log Book. This is a book which records inmate movements in Corridor 1 of the jail. Mr. May was being held in a cell in Corridor 1 on June 29 and 30, 1985.

The Log Book indicated that Mr. May did receive a visitor from 7:14 to 7:59 p.m. on June 30th; the Log Book also indicated, however, that the visit was held in the area reserved for non-professionals (the 'visitors room'). Police officers would normally visit inmates in the 'lawyers room.' The records did not reflect visits by anyone to the lawyers' room in Corridor 1 on June 29th or 30th.

The jail records reflected that Mr. Morin also received a visitor in the visitors' room on June 30th. Mr. Morin was brought out to see this visitor at 8:00 p.m., one minute after Mr. May was returned to his cell. A witness from the jail testified that there was no privacy in the visitors' room, and it was therefore possible that the visitors to Messrs. May and Morin would have seen each other in that room.

Mr. May denied that he was visited by Detective Fitzpatrick on either June 29 or 30, 1985. He did not recall who it was that visited him on the 30th, but he was sure that it was not a police officer. He could not offer an explanation for what would prompt him to come up with the story that Fitzpatrick had visited him before the confession.

Detective Fitzpatrick denied that he visited Mr. May on June 30th (or June 29th). He said that he was on leave from work from June 28 to July 9, 1985. During that period of time, he visited some of his relatives in Boston. He could not be certain of the exact date of his departure for the United States. He initially thought it was on the morning of June 29th, but later stated that it could have been on June 30th or July 1st. He agreed that, due to the passage of time, he could not prove where he was on June 30th. He was first asked to account for his whereabouts in December 1994, some nine years after the fact. His notes simply reflect that he was on leave. Detective Fitzpatrick gave Detective Jacob Poranganel, a Metro Toronto police officer investigating Mr. May's allegation, access to his Visa, telephone and gasoline purchase records for the time in question.⁹ Detective Poranganel testified that Fitzpatrick was co-operative in providing those records, and that he found nothing which indicated that Detective Fitzpatrick had visited Mr. May on June 30th.

Mr. X testified that no one discussed with him the possibility of getting a confession from Mr. Morin in advance of June 30, 1985. He did not recall receiving any visits from either Detective Fitzpatrick or Inspector Shephard before July 1st. Inspector Shephard likewise stated that he did not attend the Whitby Jail on either June 29th or 30th.

⁹ He also testified before the Commission that he would have no objection to anyone searching the U.S. immigration archives for a record of his entry into the United States.

Evidence of Missing Jail Records

Mr. Mangano's Attendance at the Jail

Basil Mangano was a private investigator retained by Mr. Morin's defence counsel at the first and second trials. He testified that in late 1989 or early 1990, he contacted the Whitby Jail to determine what records existed of professional visitors to inmates. He was told by the head of the Records Department, Mary Humphries, that the relevant records had been destroyed.¹⁰ On October 4, 1991, Mr. Mangano and a law student from Mr. Pinkofsky's office, Susan Mulligan, attended at the Whitby Jail with a subpoena for the professional visitors sign-in book records from May 1, 1985 to September 20, 1985. They spoke to Superintendent Orville Kerlew. Mr. Kerlew retrieved an envelope containing professional visitors records, and showed Mr. Mangano and Ms. Mulligan the requested records. Mr. Mangano testified that he believed they were originals because the writing was in ink and the pages were yellow.¹¹ He further testified that he was surprised to see the records, because he had previously been advised that they had been destroyed.

The records for the various dates were stapled together. In Mr. Kerlew's presence, Mr. Mangano and Ms. Mulligan flipped through the pages, looking for records from June 30 or July 1, 1985. Mr. Mangano saw records for June 28th and July 1st, but none for the dates in between. He also noted that there was a small bit of paper caught underneath the staple where the June 30th record would have been located. Mr. Mangano testified that this piece of paper was yellow in colour, and appeared to be part of a page that was ripped out of the remaining stack of records.

Mr. Mangano was cross-examined on the fact that he made no contemporaneous note of his discovery. He explained that it was Ms. Mulligan's job to report back to Mr. Morin's defence counsel, and that he was more interested in obtaining information which would prove the theory that the 'confession' was a police set-up rather than raise further questions about it. Mr. Mangano was also questioned about why he did not mention his

¹⁰ Ms. Humphries confirmed that in 1989 she thought the jail no longer had the records and that she so advised Elisabeth Widner, a member of the Morin defence team.

¹¹ Other witnesses confirmed that original records of professional visits are yellow.

discovery to Mr. Kerlew. He explained that he did not know whether or not Mr. Kerlew was on the side of the police, and he worried that alerting Mr. Kerlew to the missing page might cause the remaining evidence (the small bit of paper) to disappear. Mr. Mangano ultimately left the original records with Mr. Kerlew (after obtaining a copy for himself), and requested that Mr. Kerlew personally maintain control over them.¹² He testified that he felt safe leaving the documents because Mr. Kerlew had not been advised of their significance.

Both Detective Fitzpatrick and Inspector Shephard denied removing any original records from the Whitby Jail. Mr. May likewise denied that he had any knowledge of such an occurrence. When asked how he could have thought to include such an allegation in statements to his mother and Susan Mutch, Mr. May suggested that he once overheard a conversation between two Crown attorneys about a missing page from the Whitby Jail records. This conversation occurred either before or during Mr. Morin's second trial, in the Crown Attorney's office in London. Mr. May could not explain how he related that conversation to the time period immediately before July 1, 1985, or to the actions of Detective Fitzpatrick.

All the witnesses agreed that original jail records would not be given to a police officer unless he or she had a warrant to seize them.

Losing and Finding the Original Records

As indicated above, Mr. Mangano said he was advised in 1989/1990 that the Whitby Jail no longer had the professional visitors records for 1985, yet he was shown them by the superintendent of the jail in October, 1991. The Commission heard evidence in order to shed some light on the continuity of the jail records.

Exhibit 11 in the Commission proceedings is an envelope containing some professional visitors records from the Whitby Jail. Joan Blake, the secretary to the superintendent, testified that she was given that envelope in 1989 by former Deputy Superintendent Louie Mignon. The words "Guy Paul Morin" were written on the front. Mr. Mignon told Ms. Blake "to guard the

¹² Mr. Kerlew did not recall ever receiving such a request.

envelope with her life.”

Ms. Blake kept the envelope in her filing cabinet until she spoke to Ms. Humphries sometime in 1990 or 1991 (but no later than May 1991). Ms. Humphries mentioned that two Durham police detectives were coming to look at files pertaining to Mr. Morin, and that there was not much to show them because the file had been transferred elsewhere. Ms. Blake responded that she had the Exhibit 11 envelope, and provided it to Ms. Humphries at that time.

Ms. Blake testified that she assumed that Ms. Humphries retained possession of the envelope. In the fall of 1994, however, Ms. Humphries came to her looking for the file. A search was undertaken and Ms. Blake finally located it in a filing cabinet she used for overflow of records. This was in October 1994.

Ms. Blake testified that she never examined the contents of the envelope, although she did see some yellow professional visitors sheets sticking out of the end. It was about one inch thick when she received it from Mr. Mignon. She had not removed anything before she gave it to Ms. Humphries. When she located the envelope in October 1994, however, there was much less inside: it was “pretty much” empty.

How the Records Might Have Been Lost

Ms. Humphries confirmed that she took possession of the envelope in April, 1991, and that the envelope contained some professional visitors sheets and a hard cover Log Book. She testified that she later met with Detective Fitzpatrick and Inspector Shephard and showed them the envelope.¹³ The two officers reviewed the contents of the envelope in her presence, but she was not watching them at all times. She agreed that she probably would have noticed if the officers had removed any of the documents, but stated that she could not guarantee that they did not. When the officers left, Ms. Humphries retained the envelope. It appeared to be as thick as before. She did not recall the officers asking to take some originals

¹³ Ms. Humphries thought that the meeting occurred on or about April 1, 1991, but she could not be sure.

with them, but could not swear that they did not. She assumed they probably took copies. She stored the envelope in a filing cabinet in the records department (but not in the same filing cabinet in which they were found in October, 1994).

Neither Detective Fitzpatrick nor Inspector Shephard had any memory or note of visiting the Whitby Jail to look at records on or about April 1, 1991. Detective Fitzpatrick ultimately conceded that he may have visited the jail and viewed records with Ms. Humphries if she had a note of his visit, but he did not believe he ever had access to original records. Inspector Shephard could not state for certain that he was not at the jail on April 1st.

The next time the professional visitors records showed up was in October, 1991. Superintendent Kerlew confirmed that he met with Ms. Mulligan (and probably Mr. Mangano) at that time. Mr. Kerlew said he showed Ms. Mulligan professional visitors records, although he did not recall ever seeing the Exhibit 11 envelope before. Mr. Kerlew thought he had obtained the visitors records from either Ms. Blake or Ms. Humphries. Ms. Humphries could not be sure, but believed that she had, at some point, given Mr. Kerlew the records. Ms. Blake was off work from May to November, 1991.

Mr. Kerlew testified that the records he showed to Ms. Mulligan were about one inch thick. He flipped through them to ensure that they were professional visitors records. He did not think that there was a page missing, but could not dispute that the records could have contained a corner of a torn page as described by Mr. Mangano. After the meeting with Ms. Mulligan, Mr. Kerlew placed the records in his out-basket. Documents in that basket would normally be dealt with by his secretary, who at that point in time was a Ms. McIntyre.

Ms. Blake testified that the most likely explanation for the change in content was that someone had deliberately taken documents out of the envelope. She conceded it was possible that records had slipped out accidentally. She further agreed that only jail staff would have had access to the room where the envelope was found in October, 1994.

Both Detective Fitzpatrick and Inspector Shephard remembered visiting the Whitby Jail in July, 1985 and obtaining copies of records of who

visited Mr. Morin on June 30, 1985. Detective Fitzpatrick also recalled later obtaining a handwritten list of professional visitors for Mr. Morin from April 26 to October 17, 1985. Ms. Laura Mair, an employee of the Whitby Jail, testified that she prepared that list sometime in late 1985 from the original professional visitors records. The list does not reflect any visits on June 30th, leading to the inference that the June 30 records — if they ever existed — were already missing.

The State of the Remaining Records

Exhibit 16 in the Commission proceedings is a copy of the records obtained by Mr. Mangano during his visit to the Whitby Jail of October 4, 1991. The last entry on the professional visitors sheet for June 1985 is for June 28th. This entry is found at the very bottom of the page. Ms. Mair testified that each month the jail started a new professional visitors sheet. On the last day of the preceding month the sheet for that month would be placed in the jail's files, whether or not the sheet was full. Ms. Mair therefore agreed that either, by coincidence, the last entry for June 1985 was on June 28th on the very last line of the visitors sheet, or there is a page missing from the records which reflected further entries for the month.

Sign-in Procedures at the Whitby Jail

The Commission heard evidence concerning the sign-in procedures at the Whitby Jail. This evidence bore upon the likelihood that any record would have existed of a visit to Mr. May by Detective Fitzpatrick on June 30, 1985. Obviously, if no record existed in the first place, there would have been no need for the police to destroy one to cover their tracks.

The various witnesses from the Whitby Jail testified that all visitors were supposed to sign in when visiting the jail, but that this policy was not always followed. Particular reference was made to the back door entrance to the jail. This was the entrance through which prisoners were taken. Police officers also had access through it. Ms. Mair testified that, although professional visitors were supposed to sign in at the back door, they may not always have been required to do so if the attending guard was otherwise occupied. Superintendent Kerlew (who was not in charge of the Whitby Jail until 1988) considered this to be a serious breach of the regulations, given that only the Superintendent or Deputy Superintendent of the jail had the

authority to waive the requirement to sign in.

Detective Fitzpatrick and Inspector Shephard confirmed that they did not always sign in at the back door entrance to the Whitby Jail, and both referred to the situation where the attending guard would be too busy to present them with the register. Detective Fitzpatrick testified that he rarely signed in when he visited the jail, and that he normally entered through the back. Inspector Shephard testified that he did not sign in probably half the times he visited the Whitby Jail. He also stated that he often met the informants in the Sergeant's office, and that one could access this office without going through the area where the sign-in book was kept. In the course of his investigation into Mr. May's allegations, Detective Poranganel learned that some police officers very seldom signed in at the jail.

Ms. Mair testified that professional visitors always entered the jail through the back door on weekends. June 30th was a Sunday. Detective Fitzpatrick agreed that if he visited Mr. May on June 30th, had not signed in and had not made an entry in his notebook about it, there would be no record of the visit.

Placement of the Informants in the Jail

On the night of June 30, 1985, Mr. Morin was housed in the protective custody wing of the Whitby Jail. Individuals charged with violent crimes against children are often despised by other inmates, and thus at risk of being physically harmed by them. Questions were raised before the Commission as to why Mr. May was also housed in protective custody. It was suggested that he might have been deliberately placed there in order to have contact with Mr. Morin and thus be in a position to either induce a confession or convincingly fabricate a story of such a confession.

Mr. May gave confusing evidence on this issue. He first suggested that he was placed in protective custody because he had assaulted a jail guard and was considered a hero for it by the general population inmates. But he later stated that he did not know why he was placed in protective custody and agreed that he was a general population inmate who might be dangerous to Mr. Morin. Later still, he accepted the suggestion he might have been put into protective custody because he had got into fights with other inmates.

Superintendent Kerlew testified that an inmate would not be placed in protective custody because he had assaulted a guard (which made him a hero amongst the other inmates) or because he alleged he had been assaulted by other inmates at the instance of the guards (in retaliation). He further testified that an inmate who was an escape risk would generally be placed in segregation rather than protective custody.¹⁴ He did indicate, however, that an inmate with a psychiatric background would normally be placed in protective custody or a special needs facility.

Mr. Kerlew was not responsible for the decision to place Mr. May in protective custody and did not want to comment directly on the merits of the decision to do so. However, he did state that he may very well have decided otherwise had the decision been his.

Mr. Kerlew testified that the Superintendent of the jail is responsible for the placement of inmates within the jail. At the same time, the police sometimes provide information (such as whether the inmate is suicidal) that is taken into account when a decision is made as to where an inmate should be placed. Inspector Shephard testified that he had no involvement in the decision to place Mr. May in protective custody. Mr. Scott stated that no one consulted him about placing informant inmates near Mr. Morin. Detective Fitzpatrick was not asked about this issue.

Findings

On the basis of this evidence, I am unable to find that Detective Fitzpatrick attended at the Whitby Jail prior to the alleged confession made to May (and allegedly overheard by X), or that he encouraged either of them to fabricate a confession. Nor can I find that Fitzpatrick engaged in a cover-up of his activities by destroying evidence or intimidating witnesses.

The prime source of these allegations was Mr. May, during the period when he was recanting his trial testimony. Mr. May's claim (which he no longer maintains) is no more reliable than was his trial testimony.

¹⁴ Mr. May, of course, had just escaped from custody in May 1985. He had also planned another escape after he had been recaptured.

Indeed, accepting Detective Fitzpatrick's evidence, there is a certain irony here. Detective Fitzpatrick faces an allegation initiated by May, an unsavoury witness, respecting a crime Fitzpatrick did not commit, in circumstances where his true 'alibi' cannot be adequately documented, given the passage of time.

It is clear that better observance of the rules concerning visitors' sign-in procedures would have been of great help to the Commission. I can understand how the system slipped into laxity. Yet the rules are there for a purpose, and procedures clearly must be improved.

Various institutional records which would have assisted the Commission were lost. It remains unclear when, where and how they were lost. As well, there appears to be no consistent policy in place regulating access to institutional records (who can see them, when a warrant or other court process need be produced to the institution, when copies can be provided), or their maintenance and retention. My recommendations address these issues.

(iv) Should the Evidence have been Used?

This section of the Report asks whether the informants' testimony should ever have been tendered against Guy Paul Morin at trial. I outlined much of the evidence bearing upon this issue when I earlier considered the reliability of Mr. May and Mr. X. This section focuses on the indicia of unreliability available to the police and prosecutors, when such indicia became available, and the response by the authorities. As well, factors which were said to enhance the informants' reliability are considered here.

Indicia of Unreliability and the Police

As the investigating officers in the case, Inspector Shephard and Detective Fitzpatrick were both questioned about potential indications that the information was unreliable, and asked whether they considered and followed up those indications in their dealings with the informants.

As indicated above, Detective Fitzpatrick had been the arresting officer on Mr. May's 1981 charges of theft and break and enter, and on Mr. X's 1984 charge of sexual assault. In June, 1985, he knew that Mr. May was

still active in criminal conduct and that Mr. X had a criminal record for sexual assaults on children. *He thought May was a 'con man.' He did not think that X was trustworthy.*

Detective Fitzpatrick acknowledged that he was aware of the attempts by the informants to trade their information for personal benefit. He did not think such bargaining reduced their credibility, however, *because that was normal conduct for informants.* He was questioned about numerous statements made by Messrs. May and X on July 1, 1985, and generally responded that the statements did not cause him to doubt the reliability of the informants. He did not think that the absence of details in the confession was a badge of unreliability. He was not concerned by the fact that the confession contained several uses of the word 'fuck,' even though Mr. Morin rarely used the word and Mr. May regularly did.¹⁵ He was not troubled by the fact that Mr. May suggested that he might not be able to get Mr. Morin to repeat the confession. He was not concerned by the fact both May and X incorrectly stated that they knew Fitzpatrick well. He agreed that he thought Mr. X was lying when he denied his culpability for the 1984 sexual assault, but could not say whether that had an impact on his assessment of X's reliability regarding the confession.

Inspector Shephard testified that he had concerns about the reliability of the informants right from the start. He insisted, however, that he took into consideration a number of factors which bore upon their credibility and reliability. He considered the fact that Messrs. May and X were people who would potentially say anything to get out of jail. He considered the fact that May and X wanted benefits in exchange for their information. He considered the fact that May and X had spoken to each other before they first approached the police (although he acknowledged that he should have given this factor more consideration). He considered the fact that May failed to confront Mr. Morin with the confession during their taped conversation of July 1st, despite being urged to do so; he felt that, instead, May was trying to recreate the atmosphere which had led to the confession the night before. He may also have considered the fact that X was denying culpability for his 1984 sexual

¹⁵ Although Detective Fitzpatrick did not recall Mr. Morin ever swearing (in his presence), Mr. McGuigan asserted that it was not uncommon for Mr. Morin to swear, and referred to several examples of the July 1, 1985 tape-recorded conversation between Mr. May and Mr. Morin in support.

assault charge, even though X had pleaded guilty to the offence (although, again, he acknowledged that he should have given this factor more consideration).

Inspector Shephard accepted that there were a number of other factors which he probably should have considered. As reflected above, when they spoke to the police on July 1, 1985, both Messrs. May and X offered to provide evidence against other inmates in addition to Mr. Morin. Inspector Shephard testified:

Q. [D]id it occur to you at the time that both Mr. X and Mr. May were so anxious to strike a deal that they were offering up not only Mr. Morin, but other individuals?

A. Yes, sir.

Q. All right. Did that factor in your assessment of their reliability?

A. No, sir, it didn't.

Q. Okay. Do you think in hindsight, it ought to have?

A. Probably.

Inspector Shephard further testified:

Q. Okay. Now, we've heard evidence that Mr. X and Mr. May had a psychiatric history, each had a psychiatric history in various institutions. And you're aware of that now, I take it?

A. Yes, I was aware of it back in '85.

Q. How had you become aware of that back in 1985?

A. Well, May had escaped from the Whitby Psychiatric Hospital and he'd been to Penetang, so I would assume that he'd had some kind of psychiatric assessment or treatment, or whatever.

Q. All right. And Mr. X?

A. I can't recall whether I knew about Mr. X at that time, or not.

Q. I guess what I want to ask you is, did you or to your knowledge, officer Fitzpatrick, take any steps assuming that you knew that there was a psychiatric background, to determine the particulars of that psychiatric background?

A. I didn't. No, and I don't believe Fitzpatrick did either.

Q. Do you think with the benefit of hindsight that that's something that ought to have been done with a view to assessing their reliability?

A. Yes, sir.

Inspector Shephard later added that he might have needed a judge's order to examine the informants' psychiatric records.

In his statement to the police on July 1, 1985, Mr. May complained of being brutalized by the jail guards.

Q. Now here, he was making an allegation that a number of guards had shoved a broomstick up his rear end and assaulted him in that way. Did you ever look into that?

A. No, sir, I didn't.

Q. If that was just fiction by a jailhouse informant, and it carries some sympathy with you, and explain away the fact that he had assaulted a prison guard, I take it that would be pretty important to assessing whether he could be relied upon. Don't you agree?

A. I think if my memory serves me correctly, this happened after he assaulted the guard.

Q. Right. I mean, he's saying I assaulted a guard, so they did all these horrible things to me in the jail, and I have to get out, and so on and so forth; right?

A. Yes.

Q. Well, I guess what I'm asking is, you indicate to him, "Well, we can get you out of here, and then we can go over all that stuff and talk to John Scott about it", was that ever pursued at all?

A. Not to my knowledge.

Q. Did you find it credible?

A. Didn't find it disbelievable.

Q. All right. Well, did you know, one way or the other?

A. No, sir, I didn't.

Q. I mean, did you determine whether indeed he'd even made a complaint as he had alleged that guards had brutalized him at the Whitby Jail?

A. No, sir.

Q. Do you think that perhaps that might have been one valuable way to assess whether this was a reliable witness?

A. Yes, sir.

Q. Okay. So do you think with the benefit of hindsight, it's something that ought to have been done?

A. Yes, sir.

Mr. May advised Inspector Shephard during his July 1, 1985, interview that Detective Fitzpatrick's partner (not Shephard) had "smacked him out."

Q. Did you find that credible?

A. I didn't really find it credible, but it didn't surprise me.

Q. What do you mean?

A. Things like that happen.

Q. But first of all, did you speak to Bernie Fitzpatrick or his partner, or anybody else at Durham about this allegation that Mr. May had made that he'd been "smacked out" by an officer?

A. No, I didn't.

Q. I mean, sure, these things do happen, but I take it, in your experience, many times, false accusations have been made against officers by accused as to physical brutality; am I right?

A. Yes, sir.

Q. So, I guess what I'm asking is that when you heard this coming across the sound waves, did you find it credible, his allegation that Bernie Fitzpatrick's partner had smacked him around?

A. It wouldn't surprise me to hear that.

Q. I'm really asking something a little different. Did you find it credible, did you believe him when he said it?

A. Actually, I don't know whether I did or not, to be honest with you.

Q. I mean, if you're assessing the truthfulness or the reliability of a witness who's describing a confession in the same statement, do you think it would have been valuable in benefit of hindsight to determine whether that was even possible, that the events that he described took place?

A. Yes, sir.

Q. Okay. I mean, if that's just an out-and-out lie, that a police officer smacked him around at a police station in connection with another offence, then I take it that would very significantly affect an assessment of his reliability. I mean, here, he would be falsely implicating another person with having committed a criminal offence; right?

A. Yes, sir.

Q. Okay. I mean, I guess I'm going to ask you a searching question here, and that is, do you think because it was a confession that related to a case that was difficult in proving against Guy Paul Morin, that maybe you didn't scrutinize it with the same care and attention that you should have scrutinized it with? Do you think that's a fair suggestion?

A. Well, if I'm using hindsight now, I certainly do, but at the point in time, I don't know whether I even gave that any consideration or not.

Inspector Shephard accepted that he failed to consider a number of additional factors, but did not comment on whether or not he felt that he should have. He was asked about the informants' criminal records:

Q. All right. Well, we've heard some evidence that the circumstances surrounding some of these prior criminal convictions may reflect in a very significant way upon these two witnesses. Mr. X purports to be hearing voices when certain offences are committed. Mr. May appears to engage in a pattern of deceptive manipulative behaviour and lying. Is that something that stands out in your mind as having come to your attention back in 1985, 1986?

A. No, sir.

He was asked about a comment Mr. X made in his July 1, 1985 meeting with the police:

Q. And [he] says:

Okay — like, I know Fitzpatrick quite well, and I know some of his tricks in getting confessions and everything else, okay? And I've gained some of his fancy footwork because hey, if you can put a murderer away for twenty-five years, that's one less I have to worry about getting killed by.

Did you accept that Mr. X knew Officer Fitzpatrick quite well, knew some of his tricks in getting confessions, and had gained some of his fancy footwork [as he indicated during the interview]?

A. No, sir, I didn't put much faith in that.

Q. And that wasn't very credible, was it?

A. No, sir.

Q. All right. Did you consider that in assessing his credibility back in 1985?

A. No, sir, I didn't.

Q. Why not?

A. I guess I just never thought of it.

Inspector Shephard was asked about another comment made by Mr. X in the July 1 meeting:

Q. That fact that [X] followed the confession by immediately stating, "Is that of any value?" I gather what you've just indicated is that expression would have caused you some concern about his reliability, the fact that he's gauging how valuable it is as he's uttering the very words, right?

A. I don't recall taking that into consideration, sir.

Mr. Morin was interviewed by the police after his arrest. In an attempt to extract incriminatory statements from him, the police told Mr. Morin that they had certain pieces of evidence against him which they did not actually have. For example, they told him that his fingerprints were found on Christine Jessop's recorder. Inspector Shephard testified that, to his knowledge, no police officer had advised Mr. May of this investigatory technique with a view to having May extract a confession from Morin:

Q. I mean, it also looks, or I'll ask you, it appears [from May's interview] to look like Mr. May is putting evidence which doesn't exist to Mr. Morin to see what his reaction is going to be to that evidence. So you see for example at page 29, he says: "I was just testing him out, I wasn't sure, I was just testing him out." I said, "apparently your blood type matches the blood type that they found at the scene." And he said, "no, in court they said they couldn't tell."

So it appears that not only is Mr. May describing information acquired from a newspaper that may not have been available in the newspaper, he's putting to him evidence to get Mr. Morin's reaction which evidence was not available to the prosecution. Am I right?

A. Yes, sir.

This appears not to have been considered by Inspector Shephard.

Inspector Shephard also did not consider why Mr. May had succeeded in getting a confession from Mr. Morin, when the police, with all their expertise, had not. In fairness, Inspector Shephard testified that Mr. Morin probably viewed him as a person in authority who would likely advise others of the confession, whereas it appeared as though Messrs. Morin and May were confidants in the jail.

Steps Taken to Ensure Reliability

Both officers testified that they took positive steps to test the reliability of the informants. First and foremost, they arranged for them to be tested with a polygraph. (Both informants consented to the test and passed it.) Detective Fitzpatrick interviewed the employees at the Whitby Jail to determine what they saw or heard, and where the informants were housed. They ascertained whether it was physically possible for X to have overheard the confession from a neighbouring cell. Detective Fitzpatrick said they checked the informants' criminal records, and Inspector Shephard testified that they probably investigated the circumstances surrounding those prior convictions. Fitzpatrick also stated that he inquired of other police officers and informants whether May or X had acted as informants in the past. They had not.

Detective Fitzpatrick agreed that it was a routine part of police work to weigh and assess information coming from informants. He stated, however, that he was never concerned that either informant was fabricating the story of the confession. He believed them both, and was comforted by the fact that X corroborated May.

Inspector Shephard testified that, short of an obvious problem with

the reliability of the information, it was not his job to scrutinize the credibility of informants. He believed that function rested with Crown and defence counsel, and ultimately the triers of fact. Furthermore, it was the Crown's job to decide which witnesses to call. He acknowledged, however, that he was supposed to do more than simply 'dump' evidence on the Crown. It was part of his role to investigate the problematic aspects of an informant's evidence.

Inspector Shephard acknowledged that, in hindsight, he may not have scrutinized the confession evidence with as much care and attention as he should have. He did not feel that he failed in his duty as an investigating officer. But he knew of no rule that prohibited bargaining with informants. He would not reject a confession just because it came from a known liar. Informants are a necessary aspect of the prosecutorial system, and the courts have fashioned ways of dealing with their evidence.

Making the Deal

On July 1, 1985, the informants came forward with their information about the alleged confession by Mr. Morin. On that same day, Mr. May and possibly Mr. X¹⁶ were promised benefits in exchange for their co-operation. A question was raised as to whether the benefits were promised, and the confession evidence accepted, before the Crown was given sufficient information about the informants' reliability. If so, this might be said to reflect a carelessness on the part of the prosecution and a commitment to the informants before their evidence was properly considered. A related issue was whether the police fully advised the prosecutors of the indications that the informants might be unreliable, on either July 1st or in the years that followed.

Mr. Scott was the Crown attorney who authorized the benefits for the informant(s) on July 1st. He received a telephone call from Inspector Shephard around mid-day. He was advised in general of the information Messrs. May and X had to offer, the reasons why they were in custody, the nature of May's criminal record, and the fact that May wanted charges

¹⁶ As earlier noted, there is conflicting evidence over whether X was promised a benefit on July 1st.

dropped in exchange for his co-operation. He may also have been advised that there were some credibility problems with the informants. Inspector Shephard told him of the circumstances of the charges Mr. May was facing, and Mr. Scott authorized the withdrawal of two of them. As indicated above, Mr. Scott testified that he did not authorize any benefits for Mr. X.

Mr. Scott testified to a number of things he was not advised of on July 1st. He was not advised that the informants were bargaining hard. He was not advised that both informants told the police they had known before the confession that 'something was going to happen,' and that they were horrified by the confession, and did not want to hear it. He was not advised how long the informants had been in jail together. He was not advised that both informants claimed to know Detective Fitzpatrick. He was not advised that Mr. May was unsure whether he could get Mr. Morin to repeat the confession. He was not advised that Mr. X was desperate to get out of jail, had lied about his sexual assault conviction, and had been trying to extract statements from another inmate.

Mr. Scott defended his decision to act on July 1st. As indicated above, he testified that he agreed to withdraw two charges only in exchange for Mr. May agreeing to wear a body pack. He was of the view that such decisions have to be made instantly lest the opportunity be lost. He felt that he had enough information regarding Mr. May, the nature of the charges being withdrawn and the potential benefits to the prosecution. He added that it is not unusual for charges to be withdrawn as part of plea bargain.

Both Detective Fitzpatrick and Inspector Shephard agreed that it was their responsibility to advise the prosecutors of at least any obvious problems with the credibility or reliability of the informants. Neither could specifically recall ever doing so in this case. Detective Fitzpatrick could not recall advising the prosecutors of his concern that Mr. May was a 'con man.' Inspector Shephard did not recall ever sitting down with the Crown attorneys to discuss the problems revealed in his July 1, 1985, conversations with the informants. Inspector Shephard did assume, however, that the information obtained from the investigation, including the details behind the informants' criminal records, would have been given to the Crown. He further believed that he may have discussed with the prosecutors the fact that Mr. X was desperate to get out of jail and would have said anything to do so.

Indicia of Unreliability at the Second Trial

At Mr. Morin's second trial, Mr. Smith led and was primarily responsible for preparing the testimony of Mr. May. Ms. MacLean led and was primarily responsible for preparing the testimony of Mr. X.

Mr. Smith was aware of a number of factors which might be thought to undermine Mr. May's credibility. He knew about May's criminal record. He believed that May had an anti-social personality.¹⁷ He felt that May had a proclivity for not telling the truth, and believed that May was a liar.¹⁸ He knew that May had bargained for benefits on July 1, 1985. He knew that May had something to gain by telling a lie about the confession. He agreed that Mr. May tends to look out for his own interests as best as he can. He recognized that the alleged confession contained no details which would have been known only to the perpetrator and the police. He knew that after May was asked to wear a body pack, he stated that he might not be able to get Mr. Morin to repeat the confession. He agreed that May failed to confront Mr. Morin with the confession during their tape recorded conversation on July 1st, despite being encouraged to do so.¹⁹ He accepted that it was bizarre that in this conversation, hours after he had purportedly confessed to Mr. May, Mr. Morin was busy explaining his alibi to May. He assumed that he would have had concerns over some of the things that May had said in his testimony at the first trial:

Q. When you read the evidence of Mr. May and Mr. X, I'm going to suggest that there were certain warning bells about certain things that they said at that first trial. Mr. May testified at that first trial that he'd just be joking, for example, about when he'd suggested to officer King, that he wanted to get out of jail. He had indicated that he pleaded guilty to the false pretenses charge, which he didn't intentionally commit. That he had uttered a forged document while not trying to be

¹⁷ May and X's personnel records had been released to the defence and to the Crown by Donnelly J., upon application by the defence, prior to the commencement of the jury trial.

¹⁸ He would not go so far as to say that May was a pathological liar.

¹⁹ Mr. Smith believed that Mr. May had an explanation for this.

convincing, it was sort of a half-hearted effort. He had one of his failing to appear was his girlfriends fault. She wanted him not to appear in court. He had no thoughts about getting any kind of advantage until the lawyer spoke to him. And then, he was confronted with an earlier conversation with Mr. X, about advantages that were reflected in the King/May tapes. Didn't remember striking the guard. Said that was all as a result of a nervous breakdown. Said that he had offered a personal loan to Mr. X, because he felt empathy for him, or sympathy for him, without any reflection that it wasn't a genuine offer.

When you reviewed these matters — and they're just examples that have come out at you in the evidence, did you have concerns as to whether or not Mr. May had been forthright in his evidence at the first trial?

A. I can't say that I have a specific recollection of having those concerns and frankly, I haven't read that transcript since the last trial. But, I mean, as you read those things, I can't imagine that I would not have had concerns as to whether or not he was being truthful on those issues.

He also vaguely recalled having concerns over the fact that in his July 1st conversations with the police, May had twice referred to Mr. Morin speaking about Christine Jessop's blue skirt, when in fact the real killer would have known that Christine was wearing blue slacks

Mr. Smith did not accept X's evidence at the first trial that he had come forward with his information simply as a good citizen and in order to aid the administration of justice; Mr. Smith was aware of X's attempts to make a deal for his information (although he noted that X did eventually give up his information without getting a deal).

Ms. MacLean was asked about some of the factors which bore upon the credibility and reliability of the informants. She was aware that both had demanded benefits for their co-operation when they first approached the police. She became familiar with X's criminal record and psychiatric history. She knew that May had done a number of dishonest things in his life and, generally, had a problem telling the truth. She was concerned by the past of both May and X, but less concerned about X since his record for sexual

offences did not necessarily mean he had a propensity to be dishonest.

Mr. McGuigan testified that one must be very reluctant to immediately accept the evidence of informants. They can turn on you very quickly. Jailhouse informants, furthermore, are the most dangerous type of informer. Great care must be exercised by a prosecutor before calling one as a witness. Criminals are likely to say anything in order to get out of jail, including a false accusation.

Mr. McGuigan was admittedly aware of several indications that the informants might be lying, but generally felt that the facts were open to more than one interpretation. He knew that Mr. May had a record for crimes of dishonesty, and felt that a jury would have a great deal of difficulty accepting Mr. X's evidence. He did not trust either of them. He did not feel, however, that they were incapable of telling the truth about a particular incident. Mr. McGuigan was aware of Mr. May's psychiatric history, but stated that he never believed that May was a psychopath. He added, however, that he would not have acted differently even if he had; *psychopaths can still tell the truth sometimes*. He had also been advised (at some point) that 60 to 70 percent of prisoners suffer from some sort of antisocial personality disorder, so May's psychiatric profile did not surprise him. Mr. McGuigan acknowledged that it might appear odd that Mr. Morin was telling Mr. May about his alibi the day after he supposedly confessed, but offered the alternative interpretation that Mr. Morin was enlisting May's assistance in perfecting a false alibi. Mr. McGuigan agreed that Mr. May never asked Mr. Morin in their taped conversation whether he had killed Christine Jessop, but pointed out that May did ask whether Mr. Morin had 'fucked' her.²⁰ Mr. McGuigan did acknowledge that the informants' evidence was unusual in that there was no aspect of the confession that would have been known only to the perpetrator and the police.

Justifications for Calling the Informants

Mr. Smith testified that he accepted the core of the informants' evidence. He gave a number of reasons why. First, there were two

²⁰ Mr. McGuigan felt that this was an indirect way of asking if Mr. Morin committed the murder.

informants, and they supported each other's evidence. Mr. Smith agreed that the informants had had an opportunity to collude with each other, but maintained that logically it was more convincing that two people were saying the same thing than just one. Second, the informants' evidence was supported by the fact that an undercover officer, Sergeant Gordon Hobbs, alleged that Mr. Morin had also confessed to him. Mr. Smith added that, like the informants, Sergeant Hobbs also stated that Mr. Morin said a number of odd things which might be indicative of guilt. Third, both informants voluntarily took and passed a polygraph examination. Mr. Smith stated that although he was not a "big supporter" of the polygraph, he was nevertheless impressed that the informants were prepared to do something which might cause them difficulty if they were not telling the truth. Fourth, Mr. X was reported to have been tearful and very upset on the morning of July 1, 1985 (though Mr. Smith was also aware that the informants had engaged in horseplay with each other that same morning). Fifth, Mr. May appeared to have straightened himself out by 1992. And finally, Mr. May had agreed to have a tape recorded conversation with Mr. Morin.

Mr. Smith stated that he was also supported in his belief in the informants by the other evidence which he felt was probative of Mr. Morin's guilt. He pointed, for example, to the hair and fibre evidence purportedly linking Mr. Morin to Christine Jessop, the problems with Mr. Morin's alibi, the large number of seemingly odd utterances made by Mr. Morin with respect to Christine's disappearance, and the fact that Mr. Morin had entered an alternative plea of not guilty by reason of insanity at the first trial. Mr. Smith agreed that while such evidence was of some value in assessing the reliability of the informants, the primary focus had to be on factors relating to the confession evidence itself.

Mr. Smith testified that the prosecution must often rely on witnesses of unsavoury character, and that the Crown should not generally be assessing the credibility of witnesses. He added that he would not reject an informant simply because he or she had a lot of inherent credibility problems. He did agree, however, that it was part of his role as a Crown attorney to ensure, as best as he could, that the informants gave truthful evidence at the trial. He testified that he clearly told Mr. May to give truthful evidence with respect to every issue. At the same time, he accepted that he was required to do more than this, and that this admonition probably did not provide any additional assurance of trustworthiness for a person like Mr. May.

Ms. MacLean testified that she believed the informants were being truthful, and that she would not have called them to testify if she had not. She was asked why it was that she held this belief, and she responded as follows:

A. Well, there were a number of [factors]. First of all, we already had information that he had confessed to Mr. Hobbs ... By the time of the second trial we also had the evidence of Mrs. Jessop and the Rabsons. There was about four people that said the night of the funeral, Mr. Morin had been heard crying out, "Help me, help me, oh God help me."²¹ So that seemed to be somewhat in line with the way that Mr. May was describing the nature of the confession.

So we sort of had two similar situations. The timing at which Mr. Morin was alleged to confess to Mr. May was immediately following the preliminary inquiry, when he had been committed to stand trial, and he had had a visit from his family the afternoon or late evening of the night he was alleged to confess, which I believe was June 30th, July 1st. And the information that we had was that Mr. Morin was very depressed.

His family had told him it didn't look good for him, based on the evidence that had been called at the inquiry. I think he'd been told that two witnesses he was hoping to count on for his alibi weren't going to come forth. In the back of my mind, I have something about he had missed some family birthday, or some family gathering, and all of those things seemed to lead to a situation where one would expect he'd be quite depressed, and break down.

There was also the evidence of the jail guards, Mr. Carson and Mr. Bryans, who testified that they had observed the next morning ... Mr. X's demeanor that he was shaken and pale, and appeared to be emotionally upset about something that had happened. And, frankly, I didn't think Mr. X was that good an actor to sort of put on that, if he'd made that up. So that was consistent.

²¹ These alleged statements by Mr. Morin became known as the 'funeral night screams.'

Another factor, which of course could never be put before the jury, was they'd both passed the polygraph, and beyond that, I guess there was the factor that, from what I'd heard about inmate code of honour, is that the inmates would view someone who had raped and murdered a child as sort of the lowest on the totem pole, and then they would be more likely to want to "rat out" somebody like that.

So it seemed consistent with that. I guess by the time of the second trial, the fact that both Mr. May and Mr. X were prepared to continue to testify despite knowing what they would go through.²² Mr. X in particular — I dealt with him more — seemed, as I said earlier rather emotional around the issue of the confession, which made him seem very sincere, like he was — I don't know if you say tearful or shaken — when he was asked about the confession, that it was something that he would never forget.

And he seemed very sympathetic to the Jessops, and to the plight of having their daughter killed. I don't know if there are other factors as well, but those are sort of the main ones that strike me.

Ms. MacLean later expanded on her reasons:

Q. [I]n your mind, what was there about Sergeant Hobbs' evidence that, looking at that evidence fairly, led you to put more weight on the believability of Mr. X having heard the confession, and Mr. May having heard the confession as well.

A. Well ... I guess if you have inmates coming forward in isolation from any other evidence, you know, you have to question their motivations and other issues like that. And, so I think that the inmate evidence we were looking at, not in isolation, but in the context of all the other evidence, and one of the pieces of evidence, for example, was, as I mentioned, the crying the night of the funeral that Mrs. Jessop said she heard.

²² This is a reference to the fact that before the informants testified at the second trial they were both given the option to choose not to testify. This aspect is discussed in great detail later in this chapter.

And it seemed in a similar vein, like an emotional breakdown, with some acknowledgment of responsibility. And then the evidence of Officer Hobbs was sort of similar in that he told us that he had received a confession from Mr. Morin, and so, the fact that he was to have broken down in a jail setting, and confessed — I don't know that it was broken down with Sergeant Hobbs, but there were discussions which would appear to implicate himself.

And that was in a jail setting. Then, later on, right after the preliminary inquiry when Mr. Morin's family told him things didn't look so good, it seemed consistent that he would have been in an emotional frame of mind to break down and make some admission of guilt.

Ms. MacLean testified that she felt it was for the jury to decide whether the informants were being truthful. The Crown attorneys did not try to hide the informants' "warts"; they simply asked the jury to believe the informants in spite of their pasts.

Mr. McGuigan testified that he also believed that the informants were telling the truth. He offered a number of reasons for his opinion. The informants consented to and passed polygraph tests, while Mr. Morin refused to take one. Mr. Morin told Mr. May on July 1, 1985, that they were doing "hot talking" the night before, and "I've got the hole dug deeper." Late on July 1, Mr. Morin confronted Mr. May about a rumour circulating in the jail that he had confessed, but did not assert that the rumour was false. Both the confession and the 'funeral night screams' were purportedly made at a time when Mr. Morin could have felt abandoned by his family: the confession occurred after Mr. Morin's father told him that his case did not look good, and the funeral night screams occurred when Mr. Morin's parents were out of town.²³ Mr. McGuigan believed that Mr. Morin had previously confessed to Sergeant Hobbs. Mr. McGuigan was also comforted by the fact that the Crown at the first trial had seen fit to call the informants as witnesses.

Like Mr. Smith, Mr. McGuigan stated that the other evidence

²³ Mr. McGuigan noted that the psychiatric evidence pertaining to Mr. Morin showed that his parents had a lot of control over him, and thus their absence may have a greater impact on him than on someone else.

seemingly pointing to Mr. Morin's guilt reinforced his belief in the informants' credibility. Thus, for example, he referred to the facts that Mr. Morin had advanced an insanity defence at the first trial, had changed his alibi times seemingly in response to the evidence against him,²⁴ and had supposedly told someone that Christine had been killed on the day she had been abducted, information which might have been known only to the killer.

Mr. McGuigan agreed that the Crown must test the evidence of informants and use whatever is available to confirm their reliability. At the same time, he felt that he had no choice but to call the informants at the trial when he believed them to be telling the truth. He could not usurp the function of the jury.

Mr. Scott was also asked why he called the informants at the first trial. Although that trial ended in an acquittal, and thus was not directly involved in Mr. Morin's wrongful conviction, Mr. Scott's evidence on this issue is potentially relevant to the reasonableness of the decision made by the prosecutors at the second trial, especially in light of the fact that Mr. McGuigan was comforted by the fact that the informants had been called as witnesses at the first trial.

Mr. Scott gave the following reasons why he found the informants to be credible:

A. When you looked at the tapes relating to the interviews with X and May, and look at the information we had from Staff Sergeant Hobbs, it's a real consistence in what is indicated there. As well, the information from Staff Sergeant Hobbs that Mr. Morin would store the good thoughts at the front of his head, and the bad thoughts at the back of the head — I may have that backwards, but in any event, they would be kept in that fashion.

And you think happy thoughts to prevent the bad thoughts from coming out of your mind, was very

²⁴ Mr. Morin advanced an alibi defence at both trials, adducing evidence that he did not arrive home from work on October 3, 1984, until after the time when Christine Jessop was abducted. In his various statements to the police, Mr. Morin gave times ranging from around 4:30 p.m. to as late as 6:00 p.m, with 5:00 and 5:30 being mentioned as possibilities.

consistent with the pattern that I saw on June 30th, July 1st, in that Mr. Morin's family, as I understand it, attended. It was right after the preliminary inquiry. He was upset, arguably depressed, and having Mr. May say a number of those things to you, I'm sure it wouldn't improve your feelings.

So that the whole scenario fit in that sense, it was consistent with what Hobbs had described by way of personality. The fact that May was able to recount a great deal of material that he indicated that Mr. Morin told him about from the preliminary inquiry, and appeared to recount it very accurately, right down to, as Mr. Lockyer points out yesterday, an error that was made in the evidence of the preliminary inquiry, gave me some basis to believe in their reliability.

The fact that in the transcript, Mr. May indicates — I'll do it essentially — he says, "I'll do it anyway," at page 37 of the matter, after a long discussion about possible requests from him.

The fact that X is not someone that I ever saw as being capable of being organized to carry a story of this kind, when one looks at his criminal history, it's inevitably one of minimization of crimes. And in dealing with police officers, as well, followed by any kind of questioning, and he agrees. He's not someone, that in any of the material I saw, really carried these stories for a long time, and I appreciate he minimized what he did.

On the sexual assault that led to him being incarcerated with May, that's just not a terribly unusual thing to do when you're in jail. The dealings with these two individuals were, as I viewed it, over on July 1st. I appreciate I've had read to me the transcripts of August of 1990 — '85, but even on that basis, that's over with May in August of '85. There's nothing further that he's going to get. It's my view, it's over with May on July 1st of '85.

X gets nothing, winds up doing his time, coming out to testify — I don't see the benefits occurring to these individuals. The evidence of the jail guards, as to their emotional state at the time that these things occurred. The polygraph, the fact they both not separate — or, not

together, but separately passed, and I know that there's been a lot of evidence about polygraphs, and there's lots of potential flaws with them as well.

The — I'm sure there are other matters that I'm just not thinking of at the moment. One or two other things, actually: May didn't ever grab what, as I saw, the easy lines. If you go through those transcripts, there's one place where May has said to — the officer says — something about the recorder bag, well, did he pick it up and handle it?

I mean, the easy lying struck me at that stage, and then as to say: Yes, because he was aware from his discussions with Morin that there was a partial print on it, that was not inconsistent at that stage, with Morin's print. But instead of saying that, he says no, he says he just looked at it. Now this relates to when there apparently — but there are places where easy lines are rejected by May.

I don't see the opportunity or the time available to get X set up to carry this story. Dealing with the next day on July 1, there is a passage, which I've made reference to earlier, albeit inaccurately, that I think can go back to the events of June 30th or July 1, and be seen as certainly consistent with what May and X say.²⁵

And another feature that I didn't see until after the psychiatric evidence was called, and it's my recollection that one of the comments, his — or is stated by either X or May, is that: "Like, I killed that little girl. Why did I kill that little girl?" There's an inquiry, which I never quite could make sense of it until the psychiatric evidence was called. And then that inquiry makes a lot more sense.

And really, the psychiatric evidence, when I viewed that part of the statement — and I'm not sure, but I may have utilized that in my closing, it made sense to me of

²⁵ This refers to a statement made by Mr. Morin on July 1 which Mr. Scott had suggested might have been an adoption by Mr. Morin of statements he had made the night before. Mr. Scott had quoted the statement as "I cried my heart out about it, last night or yesterday, got the hole dug deeper."

the why, or the questioning nature of what was going on there in Mr. Morin's alleged discussion with May. Those are the matters that I can recall at this time.

Mr. Scott also testified to a few things that he had done in order to test the reliability of the informants. He had arranged for Mr. May to wear a body pack and have a tape-recorded conversation with Mr. Morin. He may have suggested that the informants be tested by a polygraph examination.²⁶ He asked to speak to the prison psychiatrist at the Whitby Jail about Mr. May.

Tunnel Vision

Several of the witnesses before the Commission were questioned in Phase I about their current views on the reliability of the informants and the innocence of Mr. Morin. This evidence is relevant to the issue of whether the prosecutors and investigators acted with 'tunnel vision, *i.e.* a single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information. If tunnel vision existed, it may cast light on how the informants' reliability was assessed, or whether there was any real assessment of their reliability, at the time.

Detective Fitzpatrick would not say, even now, that Mr. May's word was not to be trusted, even despite May's later accusations made against Fitzpatrick. He denied, however, that he suffered from tunnel vision. He acknowledged that the purported confession to Mr. May played a role in clearing other suspects, but insisted that he would have followed up any new leads pointing to other suspects, and in fact did continue to investigate another suspect after May and X came forward. He also testified that the police rejected evidence from other informants who offered information against Mr. Morin.

Inspector Shephard acknowledged that he failed to consider some factors which might have indicated a lack of credibility. He denied, however, that his failure to do so was the result of tunnel vision.

²⁶ Mr. Scott allowed for the possibility that one of the police officers may have suggested this.

Ms. MacLean testified that she still believed Mr. May was truthful about hearing Mr. Morin confess (although she did not know enough about May's recantations and current situation to know how it impacts on his credibility). She was comforted by Mr. X's corroboration and what she knew of Mr. X as a person. She stated that she would have trouble calling May to testify to the confession again, but this was because of his recantations and their effect on his believability as a witness. Ms. MacLean testified that she did not now believe Mr. Morin was guilty, but she had difficulty reconciling his innocence with all the other evidence in the case which, in her opinion, pointed to Mr. Morin as the killer.

Mr. Smith stated that he was still inclined to believe that the informants may be telling the truth, although he was less confident of Mr. May's evidence, and was bothered by the fact that May got into more trouble after the second trial.²⁷ He did not think that Mr. Morin's innocence necessarily led to the conclusion that the informants were lying. Mr. Smith could not say with certainty whether he would call the informants to testify to the confession for a third time (if there had been a third trial). It would be far more problematic than it was at the time of the second trial, but he could not rule out the possibility. He was concerned about the changes that had occurred with Mr. May, and the fact that both informants seemed less clear about their evidence when testifying before the Commission.

Mr. McGuigan firmly stated that he still believes that Messrs. May and X were telling the truth. Mr. McGuigan added that he also believes Mr. Morin perjured himself when he testified at his trials that he did not confess. Mr. McGuigan acknowledged that after the second trial Mr. May had recanted, told a number of lies about the confession, and had implicated Mr. McGuigan in a conspiracy to obstruct justice. These events did not shake his belief in Mr. May's truthfulness. Mr. McGuigan ultimately conceded, however, that Mr. Morin's proven innocence and the evidence heard before the Commission were factors relevant to a present-day assessment of the reliability and credibility of the informants.

Mr. McGuigan did not believe that informants had ever given him false information in the past, and *it never occurred to him that the informants*

²⁷ As indicated above, one of the reasons why Mr. Smith believed the informants at the time of the second trial was because Mr. May appeared to have reformed himself.

in the Morin case might have been testifying at the second trial for reasons other than altruism (e.g. in order to obtain future benefits). He indicated that, if there was a third trial, he might call the informants to testify again, but probably would not do so because of Mr. May's recantations and other actions. Mr. McGuigan denied that his actions were driven by tunnel vision. He followed up leads on other suspects at the request of the defence, even though this involved great time and expense.²⁸ He also accepted the DNA evidence proving Mr. Morin to be innocent.

Mr. McGuigan was questioned about Mr. G, another jailhouse informant. In the late 1980s Mr. G came forward with a story of another confession by Mr. Morin. He claimed that Mr. Morin confessed to him during a time when they shared a jail cell. The police investigated the claim and rejected it, primarily because G had recanted his story and the police were advised he had never shared a cell with Mr. Morin. In July 1990, Mr. McGuigan requested that a new investigation be conducted into G's story. The police did so, and determined that G had in fact shared a cell with Mr. Morin. Detective Fitzpatrick testified that he still advised the Crown that G should not be called as a witness against Mr. Morin. Fitzpatrick and Shephard found Mr. G to be unreliable. Ms. MacLean had notes dated December 12, 1990, of a discussion amongst the prosecutors (including Brian Gover) regarding Mr. G. These notes, modified slightly in this Report to disguise Mr. G's true identity, read: "Speak to Leo McGuigan's main man, 'truthful'... (per Leo) [McGuigan], or 'big fucking [risk]' (per Alex)." Mr. McGuigan had called Mr. G as a witness in a previous murder case. Mr. Smith testified that the prosecutors decided not to call G because, after the police cross-examined him, they felt he was unreliable and there was no confirmation of his evidence.

It was suggested that Mr. McGuigan's actions in this regard reflected a tunnel vision on his part: he was so determined to convict Mr. Morin that he would consider using informant evidence which the police had already deemed unreliable. Mr. McGuigan denied this suggestion. He stated that when he ordered the new investigation he did not know that G had recanted.

²⁸ Four women reported that they had witnessed Christine Jessop's murder, claiming that she was the victim of a satanic cult. The women stated that bodies were buried at various locations in Ontario, and Mr. McGuigan investigated their allegations at the request of Mr. Morin's defence counsel, Jack Pinkofsky. Nothing came of the investigation.

In his testimony before the Commission, however, Mr. McGuigan still maintained that one could probably believe Mr. G. He pointed out that the police eventually determined that G and Morin had shared a jail cell on three occasions, G subsequently returned to the position that Morin had confessed, and G claimed that he only recanted because the police treated him poorly when they first interviewed him (suggesting he was a liar). Mr. McGuigan added that he had never pondered the issue of G's credibility in great detail because he felt that the critical form of questioning adopted by the police in G's first interview made his evidence useless at a trial.

Polygraph Tests

Both May and X consented to and passed polygraph examinations. As reflected above, this was the principal means by which the credibility of the informants was tested, and one of the reasons why the investigating and prosecuting authorities believed the informants' evidence. Detective Myno Van Dyke was the person who administered the examinations to May and X. He was called as a witness before the Commission to explain how a polygraph examination is conducted, how May and X were tested, and how useful a polygraph is as a tool to test the credibility of a witness. His evidence was relevant to both the reasonableness of the authorities' beliefs and actions in the Morin case, and to the larger systemic issue of the extent to which polygraph examinations should be relied upon as a means of testing the veracity of questionable evidence.

The Mechanics and Merits of Polygraphs

A polygraph is a machine which measures various bodily reactions of a person (perspiration flow, breathing and respiratory rates, and pulse and heart rates) to questions posed by the examiner. The underlying assumption is that a person will react physiologically in a more significant way when lying than when telling the truth.

In 1985, the questioning technique used was the Control Question Technique. This is a technique which compares answers to 'relevant' questions and 'control' questions. A relevant question is one which asks for information relevant to the case. A control question is one which asks for similar information, but is not quite directed at the critical issue. Thus, for example, a relevant question for the jailhouse informants might be: On July

1, 1985, did you lie to the police about Guy Paul Morin? A control question might be: Can you now remember ever lying to a person in authority? Three relevant and three control questions are asked during the examination (along with a number of neutral, irrelevant questions designed to give the examinee a rest), and they are each repeated three times in different orders. The objective is to get the witness to lie in response to, or at least be concerned by, the control questions. His physiological reactions to those questions are then compared to his physiological reactions to the relevant questions. It is assumed that the latter reactions will be greater if his answers to the relevant questions are lies (and smaller if his answers are true).

An assumption lying behind a polygraph examination is that the examiner can formulate and present the control questions in such a manner that the examinee will either answer the questions untruthfully or at least be uncertain and concerned about his answers. Detective Van Dyke acknowledged that this is one of the problems with the reliability of the test. The questions must be finely tuned, something which poses a significant challenge for the examiner. The examiner tells the examinee to be truthful in his answers, yet at the same time tries to get him to hold back on his admissions to the control questions. He does this by ‘building up’ the examinee so that he will not want to admit anything bad about himself, while continually narrowing the control questions so as to increase the likelihood that the examinee will be forced to lie in order to hide an unfavourable truth. Detective Van Dyke offered the example of a control question which asked: Can you now remember ever lying to stay out of trouble? If the examinee answers yes, the examiner narrows the question by asking: Apart from the times that you’ve described to me, have you ever lied to stay out of trouble? The objective is to get the examinee to answer no to the control question. Detective Van Dyke testified:

Q. So the theory, as I understand it, is that somebody like Mr. May has qualified the number of times he’s lied to persons in authority, so you’ve rephrased the control question, that: Apart from the times that you’ve described, have you ever lied to a person in authority, and answer no. And the theory is that he may be truthfully answering that question — right? — but that nonetheless, you assume that he’s going to be more concerned when he truthfully answers that question [because there may be other things that he has not thought about] than he would be concerned about

truthfully answering the relevant question. Is that the assumption that this is all based on?

A. That's correct, and then that control is compared to the three relevants, so that they're — that's why there's not just one control question, as well. That's why there's three.

Polygraphs have been criticized on the basis that they assume that a person's physiological reaction to a very threatening relevant question (*e.g.* did you kill Christine Jessop?) answered truthfully will necessarily be smaller than his reaction to a moderately threatening control question. Detective Van Dyke acknowledged that this will not always be the case. For example, a person may be so concerned about how the authorities perceive him that his physiological reactions to the relevant questions, even if answered truthfully, may be greater than to the control questions. He felt, however, that if the control questions are tailored accordingly, it is still more likely that a truthful person will react less to the relevant question when telling the truth. He stated that it takes a lot of practice to be able to tailor questions in this way.

In 1985, the examiner was responsible for measuring the results of a polygraph examination. Today, the results are tabulated by computer. Detective Van Dyke agreed, however, that there remains a subjective element to the examination. The examiner sets the questions asked, and in certain circumstances he will rely on his assessment of the examinee's body language, demeanour and gestures in addition to the examinee's numerical score. He further stated that these non-verbal clues may indicate that someone is being truthful even when the tests results indicate that they are lying. He felt that the opposite was rarely true.

Detective Van Dyke agreed that some examinees may be able to fool a polygraph examination. Persons suffering from personality disorders may be able to beat the test if they feel no guilt about lying, especially if the examiner relies in part upon demeanour in making his ultimate assessment of truthfulness. The test can be distorted by someone who is knowledgeable about mechanics of and principles behind the test, such that the responses could be tailored to achieve a desired result. The test can also be beaten if the examinee does not care about the results, since the examinee must fear the consequences in order to get an accurate result. To counteract this possibility, Detective Van Dyke explained that the examiner advises the examinee that

lying to the police may have serious repercussions, in the form of a criminal charge for public mischief. Finally, the test can be fooled if the examinee cares more about his answers to the control questions (perhaps because they may reveal prior criminal activity on his part) than his answers to the relevant questions. Detective Van Dyke explained that this is why the control questions are closely related to the relevant questions, and do not deal with unrelated activity.

Detective Van Dyke acknowledged that examiner bias can influence polygraph test results. Such bias can arise from either the examiner's personal desire to assist his colleagues, who hope for a particular result, or pressure from those colleagues to arrive at a predetermined result. Detective Van Dyke stated that it was not unusual for an investigator to tell him that the police were sure they had the right person. He felt, however, that a good examiner can maintain an objectivity which allows him to overcome such bias, particularly if he makes clear to the investigating officers that the test is not foolproof. He agreed that this may be difficult for a young and inexperienced examiner. He also could not speak to the issue of unconscious bias. Detective Van Dyke was confident that his examinations of Messrs. May and X were not influenced by bias, despite the fact that he knew the examinations were important and that a failed result might cause difficulty in an extremely serious case.

Detective Van Dyke was of the view that a polygraph examination, though not perfect, is still a useful investigative tool. It has withstood the test of time, and is one of the very few ways in which an investigator can try to determine whether a witness is truthful; there simply are not enough police personnel available to investigate everything every person has to say. Polygraph examinations of suspects can also result in the discovery of valuable evidence: Detective Van Dyke estimated that he obtained confessions from about 60 percent of the suspects he found deceptive. However, he also felt that polygraph examinations should not be used as a replacement for a full and complete investigation of potential suspects, and that they should not be used for anything other than investigative purposes. He endorsed the idea that Crown attorneys should be educated on the pros and cons of polygraph examinations in order to be able to properly assess the value of a test result. He felt most Crown attorneys are already very knowledgeable about the test. The use that was made of polygraph examination in the Morin investigation generally is revisited in a later

Chapter.

Recording and Disclosing the Polygraph Examination

An issue which arose during the course of the Inquiry was the extent to which polygraph examinations are (and were) properly recorded and disclosed to the defence. Detective Van Dyke gave relevant evidence in this regard.

A polygraph examiner must be given some information in advance about the investigation to formulate relevant questions. The content of the information provided may assist others in understanding the context of the examination and assessing the possibility that bias may have influenced the results. Detective Van Dyke testified that any documentation he was provided would have been retained in the file, but that no written record would be made of any verbal communications from the investigators. He recalled some of the information he was given with respect to the examinations of Messrs. May and X. He was advised that Mr. May was a 'con artist,' and that both witnesses were jailhouse informants who might be inventing their story to get a reduction in their sentences. He was given a copy of Mr. May's criminal record. He was advised by Detective Fitzpatrick and Inspector Shephard that Mr. Morin had been arrested, that they believed him to be guilty, and that he had allegedly made inculpatory statements to an undercover officer, Sergeant Gordon Hobbs. He did not recall either investigator advising him that they believed the informants, or what the consequences would be if either informant failed the polygraph test. He stated that he would want to know before he administered a test whether the examinee has some skill in deceiving others, since this might render visual clues worthless, and also whether the examinee had only been partly truthful in his statement to the police, since this may narrow the questions deemed relevant for the test.

A number of documents were (and are) generated in polygraph examinations. Each examinee signs a consent form, the results of the test are recorded on a score sheet, a chart is (now) generated by the polygraph machine, a supplementary report is prepared for the investigator, and a record is made of any interrogation conducted by the examiner. In Mr. Morin's case, none of the documents relating to the examinations of Messrs. May and X were provided to the Crown for disclosure to the defence. The documents were destroyed pursuant to a police regulation which required destruction

after one year if no charges were laid in relation to the polygraph examination and the documents were of no evidentiary value. Detective Van Dyke made the decision to destroy the documents based on his view that they contained nothing of relevance: they were not admissible in court, and were basically a repetition of what the informants had previously told the investigators.

He added that polygraph documents were only kept for one year primarily because they were bulky, there was insufficient storage space, and retrieval of the items was difficult. Since all polygraph results are now computerized, these problems no longer exist and all documents are now kept by the police, unless they have no apparent relevance to anything.

Detective Van Dyke did not recall much about the responses given by May and X during their tests. He simply remembered that they both produced good truthful results. In 1985, very few of the examinations of male witnesses were tape-recorded, but today every test is tape-recorded and the tapes are retained by the police. Detective Van Dyke agreed that such a record can be helpful in documenting what the witness said during the examination, and in assessing the quality of the examination conducted.

Findings

This section of the Report answers the question: Should the prosecutors have called the evidence of these informants?

In a later section of this chapter, I summarize the systemic evidence which I heard on jailhouse informants. It has led me to conclude that jailhouse informant evidence is intrinsically, though not invariably, unreliable and that many of us have failed in the past to appreciate the full extent of this unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, their reliability.

Inspector Shephard was candid — commendably so — in acknowledging that a number of things that the informants said and did should have been more carefully scrutinized and investigated. Detective Fitzpatrick obviously had little or no concern about their reliability and less insight than Inspector Shephard has now.

Some of the things that the informants said (for example, pertaining

to their own criminal activities and their motivations) were patently unreliable. Evidence that Mr. May gave at the first trial was, at times, demonstrably untrustworthy. In my view, the prosecutors at the second trial did not *objectively* assess the reliability or credibility of these informants. Their focus was, instead, on their presentability. Accordingly, when confronted prior to the second trial, with the informants' diagnosed propensity to lie prior to the second trial, emphasis was placed upon denigrating (or minimizing) that evidence, rather than introspectively questioning whether their reliability should be revisited. Mr. McGuigan testified that he did not trust either of them, but did not think they were incapable of telling the truth. Mr. McGuigan, when confronted with the informants' psychiatric and psychological profiles at this Inquiry, stated that he never believed that May was a psychopath; however, since psychopaths are still capable of telling the truth, this would not have affected him anyway. He noted that such a diagnosis would not surprise him in any event, since 60 to 70 percent of prisoners suffer from antisocial personality disorders.

With respect, Mr. McGuigan missed the point. Two sociopaths, motivated to obtain benefits, who allege a 'bare-bones' confession containing no detail known only to the perpetrator, absent any real confirmation of what they said, should ring far more alarm bells than were rung here. Mr. Smith admitted that May swore to some problematic things at the first trial — but his core evidence could still have been true. I agree that such evidence *could* still be true. I also acknowledge that sociopaths *can* tell the truth. These observations, however, do not support the informants' reliability or provide any level of comfort.

I find that Mr. McGuigan did not really endeavour to evaluate the informants' reliability; this was also true for other pieces of suspect evidence later addressed in this Report. He reflected here the dangers of jailhouse informants and the great caution to be exercised in dealing with them. However, his dealings with May and X, some of the other suspect witnesses, and his inclination to try to resurrect the somewhat discredited Mr. G, demonstrate that he evaluated potentially incriminating evidence almost exclusively on the basis of whether it tactically advanced the case; any such evidence would be called by Mr. McGuigan unless he felt that it would tactically backfire, not because it was unreliable in fact. That is one reason why the second trial saw the introduction of a number of items of dubious value. (Potentially exculpatory evidence was not so easily favoured.)

However, having said that, I believe that the prosecutors did regard May and X as truthful on the critical issue. The polygraph results figured prominently in that belief — and understandably so. One of the lessons at this Inquiry, coming from the polygraphist himself, was that undue reliance should not be placed on those results. No doubt coloured by their views on Guy Paul Morin's guilt, the informants looked better to the prosecutors than they were, evidence which undermined them was more easily discarded, and largely inconsequential evidence became confirmatory. This is unfortunate but understandable. Equally important, the prosecutors were correct in their view that no existing law or ethical standards prevented them from calling even suspect evidence, so long as they did not *know* that the evidence was perjured. Many a prosecutor has said, supported by authority: "Let the jury decide. It's not my decision."

The current Ministry policy manual articulates the criteria which should be considered by prosecutors in evaluating informant reliability. I have suggested some changes to those criteria which are reflective of the evidence heard at this Inquiry. I have also addressed the extent to which prosecutors should assess reliability, and how their role relates to the role of the triers of fact and the defence. My findings help explain these and other recommendations which later follow.

Had the present policy manual been in effect during Guy Paul Morin's trials (together with my recommended changes), a decision should have been made that the informants were not to be tendered as witnesses. This represents a change in policy, which cannot be visited upon the prosecutors at the first or second trials. *Put succinctly, I find no misconduct in the prosecutorial decision to call these informants.*

Mr. McGuigan still believes that the informants were telling the truth and that Guy Paul Morin lied about his 'confession.' Detective Fitzpatrick holds similar views. Indeed, though Mr. McGuigan believes that Mr. Morin is innocent, he also believes that he and his family deliberately concocted a false alibi. An innocent person has been known to tender a false confession — though mostly in the context of a police interrogation. An innocent person has been known to tender a false, concocted alibi. I have found that Mr. Morin did not confess to May; I also have no doubt that Mr. Morin and his family (however imperfectly conveyed) did not concoct his alibi. The fact that Mr. McGuigan still accepts Mr. May's evidence, in the face of Mr.

Morin's proven innocence, May's recantations, May's non-rehabilitation, and most importantly, in the face of May falsely alleging that McGuigan himself was a conspirator in framing Morin, is 'tunnel vision' in the most staggering proportions. The fact that Detective Fitzpatrick still accepts Mr. May's evidence, in the face of these facts and May's false claims that Fitzpatrick had threatened to kill May, etc., demonstrates an equally persistent 'tunnel vision.'

These findings of 'tunnel vision' also explain the need for the recommendations which later follow.

(v) The Offer Not to Testify

Overview

At some point during the second trial, both informants were given the opportunity to choose not to testify at the trial. Both rejected the offer. This information was not disclosed to the defence. It only became public knowledge after Mr. May divulged it in his response to the last question asked of him in re-examination by the prosecution. It was submitted by the Morins that the offer was actually a ploy to artificially bolster the tainted credibility of the informants in response to the allegation that they were only testifying out of self-interest. After all, if they could say that they had the choice not to testify without suffering any repercussions for that decision, could they not also say that they were only testifying out of a sense of civic duty and not for any personal gain? This section of the Report addresses this issue.

It is important to note at the outset that there are several possible variations to the allegation that the offer was a ploy. At the most serious level, it could be alleged that the informants and the authorities agreed together to create evidence to bolster the credibility of the informants. The informants knew that the offer was not genuine, and rejected it as part of an artificial exercise so that they could later claim they rejected it out of a sense of moral imperative. A second variation of this allegation could suggest that the informants were not necessarily a part of the ploy. The prosecution simply inquired what their responses to an offer would be, and then only formally presented the offers once they felt comfortable that they would be rejected. This variation would allege that the Crown attorneys were

surreptitiously trying to create evidence in their favour and not that they 'agreed' with the informants to create evidence. A third variation could allege that, although the Crown may not have had an oblique motive for creating evidence, once it existed (*i.e.* once the informants rejected the genuine offer), they hid the information from the defence in order to set a trap: let the defence blindly attack the credibility of the informants on the basis that they were only acting out of self-interest, and the offer would then be mentioned and thereby eviscerate the attack.

The Decision to Make the Offer

All the relevant witnesses were asked about the circumstances surrounding the decision to make the offer to the informants: when it was made, who was present, and whose idea it was. As a general rule, Ms. MacLean had a somewhat different recollection than the others.

Mr. McGuigan testified that the idea of making the offer to the informants first arose in mid-December 1991 during the course of the second trial and shortly before the Christmas recess. All three Crown attorneys, their law student (Allison Shanks), and Detectives Chapman and/or Fitzpatrick were present. The informants' names came up during a conversation about the progress of the trial and the witnesses who were next to testify. After learning of the hardship that Mr. X had endured as a result of testifying at the first trial, Mr. McGuigan suggested that they give X the option not to testify if he did not want to. Mr. McGuigan presented to the others that he was motivated by humanitarian reasons; he may have expressed this by saying that he was "moved by the Christmas spirit." Everyone seemed to agree with the idea, and McGuigan proposed that they think about this over the holidays; no final decision was made at that time. The issue next arose in late January when Detective Fitzpatrick mentioned that he was going to bring the informants to London so that they could be prepared for testifying. The decision was then made to extend the offer to both informants.

Mr. Smith's recollection corresponded in several respects with Mr. McGuigan's, but was not as specific. Mr. Smith testified that the offer was first discussed after the Crown's opening to the jury and before the Christmas break of 1991. (The Crown opened to the jury on November 13, 1991.) He had no clear memory of who was present, but thought that the three Crown attorneys, Sergeant Chapman, Detective Fitzpatrick and Inspector Shephard

might have been. He was confident that Mr. Scott was not present. He believed that the offer was discussed on more than one occasion, but could not recall a meeting when the actual decision was made. He was fairly confident that it was Mr. McGuigan who came up with the idea. Like Mr. McGuigan, Mr. Smith said that the idea was borne out of a discussion concerning the hardship which Mr. X had suffered as a result of testifying at the first trial.

Detective Fitzpatrick testified that he was present during a discussion about the idea of extending the offer to the informants. The three Crown attorneys, a police cadet and possibly Detective Chapman were also present. The discussion occurred in Mr. McGuigan's temporary apartment in London at some point in the second trial. This was the only discussion concerning the offer of which Detective Fitzpatrick was a part. The idea came up during the course of a casual conversation about the problems that both informants had gone through after the first trial. Detective Fitzpatrick could not recall who came up with the idea of the offer, but he did not think it was himself. After one or two hours of discussion, a consensus was reached and the decision to extend the offer was made.

Ms. MacLean agreed with her colleagues that the idea of the offer first came up in December, 1991. She differed, however, on who was present and whose idea it was. She stated that John Scott was present during the discussion and that he was the one who first came up with the idea of making the offer. Ms. MacLean recalled that Mr. Scott was in London visiting with the prosecution team: the three Crown attorneys, Ms. Shanks, Detective Fitzpatrick and maybe Detective Chapman. It was a social gathering. At some point, the conversation turned to how unnecessarily harsh the cross-examinations had been of some of the Crown witnesses and how the informants would likely be subjected to a very vigorous attack on their credibility. During this discussion Mr. Scott raised the idea of the offer; Ms. MacLean did not recall exactly what he said. She testified that there was only one meeting about the offer. No real objection was raised to the idea and the decision was made. At the end of the meeting, someone asked Detective Fitzpatrick to tell the informants.

Mr. Scott testified that he occasionally went to London to visit with the members of the Morin prosecution team, and that during those visits people would often discuss the progress of the trial. He also remembered

having dinner at Mr. McGuigan's apartment. He had no recollection, however, of ever participating in a discussion about the offer. He could not foreclose the possibility that he may have been present during such a discussion, but he did not recall ever suggesting that the informants should be able to refuse to testify. Mr. Scott stated that he was not involved in the strategic decision-making for the second trial. At the same time, he was aware of Mr. X's troubles and the purportedly abusive cross-examinations by the defence, and he could conceive of coming up with the idea of the offer, especially in light of Mr. X's cross-examination at the first trial and his 'pathetic background.'

Although several witnesses thought that Detective Chapman might have been present at the discussions about the offer, Detective Chapman himself had no memory of being there. He testified that his absence would not have been surprising. At meetings with the Crown attorneys, he would normally just obtain instructions about what he was required to do and then leave. Inspector Shephard also testified that he was not present during any of the discussions. Mr. Smith, the only person who thought he might have been present, accepted in cross-examination that he was not. Mr. McGuigan stated that he never discussed the offer with Inspector Shephard.

How the Offer was Used

McGuigan testified that after the offer came out in evidence at the second trial, it became one of the most important pieces of evidence used to support the informants' credibility. Mr. Smith stated that the offer created quite significant evidence in favour of the informants' testimony. Ms. MacLean accepted that the informants' right to say that they were testifying voluntarily was a right that could only benefit the prosecution.

The offer was used by the prosecution in its closing address to bolster the credibility of the informants. Mr. McGuigan told the jury:

I'm going to review the evidence of Messrs. May and X, but first, general observation.

We heard in evidence that both Mr. May and Mr. X appeared at this trial on their own volition. They were both given the opportunity to decline to testify, to walk away from it all, no charges, no hassles, no

recriminations. Both did not accept that offer and came forward at this trial, testified and placed themselves knowingly in a position where their whole life would be examined under the microscope of cross-examination.

.....

You should consider that Mr. May has a criminal record and his admissions that in the past he has lied and deceived a number of people but I would also ask you to consider that Mr. May testified at this trial an (sic.) a volunteer. It is clear that he had no hope of any advantage or gain as a result of his testimony before you, and that he was under no compulsion to come forward and face the lengthy, searching, and at times, embarrassing cross-examination.

.....

I might just say in passing, both Mr. May and Mr. X, you cannot believe, having heard their testimony, that they are any great lovers of the police. They are not, in my submission, coming forward here to help the police. You heard their evidence about exactly how much they trust the police and their past dealings with the police, and so this is not - and Mr. X, in indicating about the offer was made, that he didn't have to come to this court and testify, said: "I believed it because it came from the Crown." I take it from that that had it come solely from the police he would have had some difficulty in accepting that. In any event, they're not police lovers. I think that's very clear from the evidence.

.....

You saw Mr. X testify. It was obviously not easy for him to come here and discuss the details of his past offences and his involvement with his uncle.

He was given an opportunity to avoid all of that and yet he chose here, he chose to come here voluntarily and to testify before the 12 of you, and I submit there is simply no reason for him to come before you and lie about hearing the accused's confession in those

circumstances.

.....

Finally you have the offer that was made to Mr. X and May, the opportunity they were given to decline to testify in this case. Counsel ask you to believe that Robert May couldn't resist the gratification that he would get by testifying. I ask you, did Robert May look like he was having fun when he was up in that witness box? You watched him as every intimate embarrassing detail of his background was dissected over a period of six days. Do you really believe Mr. May subjected himself for his own gratification?

What of Mr. X? There's absolutely no evidence that he would get any gratification by subjecting himself to a searching cross-examination about his sexual difficulties, sexual offences, or the abuse he received from his co-workers. And I submit to you that all that Mr. X got out of this was grief.

The offer was also referred to by the trial judge as a piece of evidence which reflected on the informants' credibility:

Mr. May testified that he was aware he was in for "a bit of a bashing" in cross-examination, and was prepared for that. In connection with this trial, he presently is in no way under police power and expects and has received no advantage from Crown or police. He stated he was not pressured by the police in connection with his testimony. Although he was given the opportunity to not testify, he response was, "I said, forget it". Regarding the offer made to May, that he could withdraw from testifying, Dr. Malcolm would have expected Mr. May couldn't resist an offer that would put him on centre stage. Dr. Malcolm didn't regard that offer to withdraw as a test of truthfulness, In his view, May would say exactly what he said earlier. This evidence that May voluntarily chose to testify also bears on the issue of whether May's evidence is forthcoming in return for a benefit received by him.

.....

Because of the hardship he endured following his

testimony at the first trial, Mr. [X] was given the opportunity not to testify at this trial, without fear of charges or harassment by police and Crown attorneys. However, he chose to testify. This evidence that [X] voluntarily chose to testify bears on the issue of whether [X's] evidence is forthcoming in return for a benefit received by him.

The Reasons for the Offer

All three Crown attorneys were asked why the offer had been made. All three responded that it had been made for humanitarian and compassionate reasons only: it was not an attempt to artificially bolster the credibility of the informants.

Mr. McGuigan testified that he brought up the idea of making the offer to the informants after he learned of the abuse that Mr. X had suffered as a result of testifying at the first trial. As examples, Mr. McGuigan listed the facts that Mr. X had received death threats, had a bucket of bolts poured over his head and had cigarette butts thrown into his coat. There were also numerous signs posted at his workplace mocking, harassing and insulting him. Mr. X ultimately had a nervous breakdown. Mr. McGuigan stated that he was astounded by the abuse, and felt that there was a very good chance of it re-occurring after X testified at the second trial. He was also concerned by the fact that Mr. X now had two young children, and that they might also suffer abuse.

Mr. McGuigan said he was mindful of the obligation on Crown attorneys to be kind and gentle to witnesses, adding that throughout his career he had always been concerned that witnesses were the 'lost people' in the judicial system. Finally, Mr. McGuigan was also concerned about the manner in which Mr. Morin's counsel, Jack Pinkofsky, had cross-examined prosecution witnesses to that point in the trial. He felt that Mr. Pinkofsky had ridiculed and harassed the witnesses, and had subjected some people who had only assisted in the search for Christine to some very intense cross-examination. He acknowledged that he had expected Mr. Pinkofsky to be aggressive and relentless, but said that during the trial Mr. Pinkofsky had gone to the extreme. Mr. McGuigan could see that Mr. X was in for a rather

difficult cross-examination.²⁹

Mr. Smith referred to similar reasons for the decision to make the offer. He said:

A. Certainly it was clear specifically with respect to Mr. X, that Mr. X had gone through a significant hardship as a result of his testimony at the first trial. It was clear that he would undergo very significant and vigorous cross-examination at the second trial.

I think that was probably heightened by the cross-examination of other witnesses who we felt were relatively neutral, and so it was — you know, the primary issue was the hardship that he had gone through, but as well, it was clear that he would not have a fun time when he testified.

Q. All right, he wouldn't have a fun time when he testified, and how did that generate itself into a discussion that he would be given an offer that he need not testify?

A. Well, as I recall it, the focus was on — well, clearly the testimonial aspect was part of it, the focus was on the hardship that he had suffered, and the conclusion was reached that he ought to be part of the decision as to whether he is placed in the risk of further such hardship or not.

Mr. Smith later added that he felt that Mr. Pinkofsky's cross-examinations were sometimes sarcastic and highly personal, and that he (Smith) was offended by the suggestion that some of the civilian witnesses, who appeared to be simply coming to Court to tell the truth, were shading their evidence in favour of the prosecution. He stated that the decision to make the offer arose as the Crown attorneys saw how the trial was unfolding and the witnesses were being cross-examined. He further testified that, apart from the offer, the Crown never gave any serious consideration to not calling the informants as witnesses.

²⁹ When cross-examined on this latter reason for the offer, Mr. McGuigan later stated that it was not his most significant concern.

Ms. MacLean's explanation for why the offer had been given was similar to those of her colleagues, but made greater reference to the interests of Mr. May. She said:

Q. And who was the one who suggested that this offer be made to Mr. May and Mr. X in the presence of the other Crowns?

.....

A. It was Mr. Scott's idea, as I recall, to answer your question directly.

Q. It was Mr. Scott's idea that this offer be made?

A. Yes. I mean, he and Mr. McGuigan were the two that were discussing the issue primarily, but I thought it was Mr. Scott who first suggested it. And what had happened was that at that stage in the trial, we had observed Mr. Pinkofsky's dealings with other witnesses and — I don't mean to sound critical, but he was fairly harsh with some civilian witnesses that took us by surprise that he'd be that harsh with them, and, we were — I think, Mr. Carruthers is one example I recall, he sort of mocked him about failing English, or something like that. And I don't know if Miss Hester had testified yet, but he was pretty rough on her, and Officer Robertson, who was the dog officer who had the search — or tracking dog, I guess you'd call it, was also dealt with fairly aggressively.

And we're observing that by the time Mr. May and Mr. X testified, that they would be in for a very rough go of it, if that's the way that those witnesses would be treated, they'd be dealt with harshly. And it was recognized they had to be vigorously questioned and that would have been expected. But the concern was, because at that stage there had been access to what — in my experience, was unprecedented, unprecedentedly broad material regarding personal matters with these two men, the psychiatric records, I think, were the most troublesome to us.

At this stage, the *O'Connor* decision obviously had never been decided and it was very early in the development of the law that there would be access

made to third party records and I think it troubled us to a large extent, that just because these men were witnesses, their entire histories, including very personal, private psychiatric matters, would be exposed to the world, because this was obviously covered — this trial was covered on national — in the national media.

Q. Why did it trouble you?

A. Well, I think as a Crown, we always we feel we have applicable responsibilities towards people and I think in a compassionate sense, the fact that someone's a witness, it exposes their entire history, including — well, under the Mental Health Act, there's a presumption that your medical, psychiatric records will not become public, will not be in the public domain, and, as well, nowadays, with the *O'Connor* applications, the judges normally got the material, and edit what's irrelevant...And, Justice Donnelly chose to deal with it differently. He — I think, expressed that he didn't feel comfortable with determining relevance, so he left it to us as counsel, to review all the material, so we weren't allowed to photocopy anything, but we were allowed to make notes and the defence were ... of everything in those materials. And so, I think it struck us as a very difficult situation for these men to have all of that exposed.

Q. Well, your concern was that these particular two men would — that their privacy would be invaded by reason of this? Was that it?

A. Furthermore, well, that was with respect to Mr. May.

Q. Yes.

A. But furthermore, with respect to Mr. X, at that point we'd already had the motion on the ban on publication.

Q. Yes.

A. Where there was a significant amount of evidence called, and, actually, later in the trial, photographs were produced demonstrating that Mr. X at his workplace,

had been threatened, harassed, assaulted, almost set on fire, and his actual safety was compromised, just by the virtue of him being a witness, and the publicity that had followed, and certainly by the time of the second trial, Mr. May did not have the protection of a publication ban.

Ms. MacLean also thought that the impact of Mr. X having to relive in cross-examination the abuse he endured from his uncle could be devastating.

Detective Fitzpatrick testified that the idea of the offer came up during a conversation about the problems the informants had been enduring since the first trial. People felt sorry for the informants and therefore they decided to make the offer.

Detective Chapman testified that, as far as he knew, the offer was made because the informants had been suffering problems. He never heard that the offer was not genuine, or that it was made to enhance the informants' credibility.

The Anticipated Cross-Examination of the Informants

The three Crown attorneys were asked whether they anticipated that the defence would cross-examine the informants on their motivations for testifying. This evidence bore upon the Crown's motive to take action to counteract such an attack on the informants' credibility.

Mr. McGuigan stated that he knew that the defence position was going to be that the informants had fabricated their evidence out of self-interest and were now stuck with their story. He acknowledged that their credibility was going to be a difficult issue. He expected the defence to muster an aggressive and relentless attack. Mr. Smith stated that it was inevitable that the defence was going to attack the informants' motivations. Ms. MacLean said it was an obvious line of attack for the defence to allege that Mr. May had only come forward out of self-interest.

The Offer Enhancing the Informants' Credibility

All three Crown attorneys testified that they eventually came to

realize that the offer could enhance the credibility of the informants.³⁰ All three stated, however, that they did not come to this realization until after the offer had been made.

It was suggested to Mr. McGuigan that May and X seemed to have fully appreciated the significance of their decision to reject the offer as enhancing their credibility and it was strange that the Crowns did not seem to appreciate it that way. Mr. McGuigan agreed that it was only common sense that the informants' rejection of the offer would enhance their credibility. He could not explain why it was then such a surprise to him when the informants mentioned the offer in court in response to challenges to their motivations for testifying. He pointed out that he was not involved in preparing the informants to testify.

Mr. Smith ultimately testified that he was not aware of the significance of the offer until after Mr. Pinkofsky pointed it out. He had initially testified, however, that he became aware of its significance when he did his own assessment of Mr. May's credibility. He said:

The fact that Mr. May came, notwithstanding the offers I indicated earlier, caused me comfort. So, was I aware of its significance? Of course I was aware of its significance because it's something that I found helpful in my personal consideration of May's credibility. The point was that I never intended that that would be something that would be evidence at the trial.

Ms. MacLean insisted that she had not realized how the offer could boost the informants' credibility until the defence raised the issue at trial. Much of her evidence appeared inconsistent with that position, however. She stated that during the December, 1991, conversation about making the offer to the informants, it was suggested that the informants, should they reject the offer, had the right to say that they were testifying voluntarily. This is part of her testimony:

Q. Okay. Well was there much debate at this meeting

³⁰ Mr. McGuigan later qualified this with respect to Mr. X, stating that he did not think the jury would have put a lot of weight on his evidence irrespective of his voluntary status, given his record for sexually abusing children and hallucinating.

when Mr. Scott introduced this idea? Were those who said, well let's, I'm just speculating, did someone say: Well look, we can't give these fellows this option, if they walk out of this trial we've lost our direct evidence. Did anyone say that at the meeting?

A. No. Somebody did say: What if they accept the offer?

Q. Yes.

A. But not in the sense of going further than that, that's our only direct evidence walking out, it didn't go that far. And, as I mentioned before, I don't want it to sound like Mr. Scott was the only one talking, as I recall, Mr. Scott and Mr. McGuigan were the two discussing the issue. But, when that issue was raised, I don't know if that was Mr. McGuigan or Officer Fitzpatrick who raised that, I think Mr. Scott at that point said, well, if they're forced to be here and they go through all of this, at the end, the defence could say, well, you're only here because you're forced to be here.

And undermine their evidence in that respect, I think there was a discussion as Mr. Ruby had done at the first trial, to suggest that you're only here because you're forced to be here and you're only repeating the confession because you're worried about perjury. And, so, the response was that these men, if they're going to be put through all of the things I've just discussed, have to have the right to be able to say, well, I'm here because I chose to be here. I don't think it would be fair to them not to be able to say that.

Ms. MacLean emphasized that the offer was not made in order to give the informants the right to say they were testifying voluntarily. The discussion about this 'right' occurred at the end of the conversation about the offer, essentially as an afterthought. It did not lead to a discussion about how the offer would enhance the informants' credibility. That issue was never raised.

Ms. MacLean was later cross-examined on the implications of her evidence:

Q. Now, I believe your evidence with regard to the offer, and this is at least as early as December 4th, was that it was important to the Crowns that Mr. May and Mr. X could say, I had the right to choose to be here, and that means to testify. Is that ...?

A. That was sort of an element that was discussed at the end, yes, that's right.

Q. Okay. Would you agree with me that their being able to say so really goes to the issue of motivation?

A. Yes.

Q. And, so motivation was considered as an issue as early at least since December 4th of '91?

A. Yes, it was — that issue was raised, that's right.

Q. And did it not occur to you then, that this whole issue of motivation would then have a bearing on their credibility and certainly would be an issue at the trial?

A. Later on it did. As I said, as the time of the meeting it was — the issues that we were focusing on were the compassionate or humanitarian, however people choose to describe the issues.

And that it was in the context of them having — if they're going to have to basically endure that type of inquiry, that they have to have the right to be able to say that they're there voluntarily. And that was that in that context. The issue about the effect of it enhancing their credibility didn't, I guess, gel, or whatever, until the questioning by Mr. Pinkofsky.

.....

Q. I suppose what I'm asking you is that, doesn't any issue of motivation really go to credibility?

A. Yes.

Q. So, wouldn't you agree with me that if the issue of motivation was thought of as early as December 4th, so was the issue of their credibility in terms of their

motivation.

A. Yes, because clearly the issue of their seeking benefits on July 1st was well known to us and their — that issue, in terms of their credibility, was a very live one. That when they came forward with the information, they both sought benefits for themselves, and that was very clearly known to us.

Ms. MacLean also gave the following evidence:

Q. Remember saying that yesterday? "We wanted them to be able to say, 'We chose to be here.'"

A. We wanted them to have the right to say that, yes.

Q. Right. And you were saying that in the context of the December discussion?

A. Yes.

Q. All right.

A. That's fair.

Q. So that's pretty clear, isn't it? As of December 4th, "We" — the Crowns — "wanted them to be able to say, 'We chose to be here'", is really another way of saying that we wanted them to be able to respond to the Ruby-type questioning from the first trial?

A. That's fair, yes.

Q. ...That, incidentally, is an acknowledgment by you, is it not, that it was anticipated long before Mr. May's re-examination that these offers, and the rejection of these offers, could come out in evidence?

A. Yes.

Mr. McGuigan was confronted with Ms. MacLean's evidence. He denied that there was any such discussion about the informants' right to say they were testifying voluntarily.

An Offer Made to Both Informants

Messrs. McGuigan and Smith were asked why the offer had been made to Mr. May as well as Mr. X, since the concerns seemed to centre around Mr. X. Mr. McGuigan responded:

Q. Well, you indicated some of the motivations that prompted the offer to Mr. X; why make the offer to Mr. May?

A. Well, if you made the offer to Mr. X, and he accepted it, and you didn't make the offer to Mr. May — I mean, you've had the benefit of seeing Mr. May. He's not an individual that would sit still and listen to — and feel that he was treated more shabbily than Mr. X was. You would be hearing about that, and secondly, in many ways, they're in the same boat, and it seemed to me that given the fact that this would have caused Mr. May, in my opinion, to be serious — it would seriously have affected his evidence had he not been given the same option.

Q. Seriously affected it in what way?

A. Well, I think he would have said: I don't care, I'm just going to go up there and I'll answer it whatever way I feel. If it's a tough question, I'll agree, if it isn't, I won't, because these guys don't care about me. One of the things about inmates that I've learned is that, as I've said previously, they're very, very touchy about all kinds of matters, and if you treat inmates with respect, they respond accordingly, and he would look upon this as lack of respect for him, and his evidence would be, in my opinion, would have been affected.

Mr. Smith could not recall the specifics of the conversation about why an offer had to be made to Mr. May. He thought that it was primarily because it would be difficult to only make the offer to Mr. X. But he also noted that while Mr. May had not suffered grief to the same extent as Mr. X, he had still suffered, and would still be subjected to a very searching and embarrassing cross-examination by the defence.

Ms. MacLean's explanation for the offer made reference to Mr. May,

but she did acknowledge that the concerns with respect to him were less than with respect to Mr. X. She also agreed that when the Crown applied for an order banning the publication of Mr. May's identity, it did not adduce any evidence of hardship suffered by Mr. May as a result of testifying at the first trial. She stated, however, that Mr. May had suffered some personal embarrassment and difficulty with family and friends. He had also had a broom handle inserted up his rectum by jail guards.³¹ Ms. MacLean maintained that Mr. May might suffer as a result of highly intrusive and embarrassing questions based on his psychiatric records. Finally, she agreed with her colleagues that fairness dictated that the offer be given to both informants.

Detective Fitzpatrick did not recall why the offer was made to Mr. May. He simply assumed that if it was going to be made to one informant, it had to be made to the other. Detective Chapman testified that the offer was made to May because he had suffered family problems as a result of testifying at the first trial, and also because he was going to be cross-examined on his psychiatric record. Detective Chapman did not know where he learned that information.

The Publication Ban

The three Crown attorneys were examined on why they felt the need to make the offer to Mr. X after they had already obtained a publication ban with respect to his identity. The prosecution had applied for the ban in order to enable Mr. X to testify. During her submissions on the application, Ms. MacLean advised the Court why the informants were very important witnesses, and why the ban was necessary for the due administration of justice.

All three Crown attorneys responded that they did not feel that the publication ban would completely protect X from suffering further difficulties as a result of his testimony. They pointed to the fact he had testified at the first trial without such a ban, and thus a significant number of people would still know that he was the unnamed informant testifying against

³¹ This unsubstantiated claim by Mr. May allegedly occurred prior to May's involvement in the Morin investigation.

Mr. Morin. Mr. McGuigan, for example, testified:

Q. I mean, the Crown has taken measures which have been accepted by Justice Donnelly to better protect this witness so that the public doesn't have his name or any information leading to his identity, so the Crown's taking affirmative steps to further protect this witness to ensure that he can give evidence.

A. Yes.

Q. So do you not see some contradiction between taking those measures and then deciding to make him an offer that he doesn't have to testify at all?

A. Well, I think, first of all, had Mr. May also received the same protection as Mr. X, I think it would have had more significance. The difficulty was that the two of these were connected at the first trial, and when you have the paper reporting Mr. May says so and so, all the people who knew him, all the people at Hydro who he worked with, his ex-neighbors and friends and so on, would all know who X was. And although it was a help and an assistance, in my opinion, it was not the total answer. This information would still be — come into the possession of a number of people knowledge and he was still open for further difficulties.

Q. He changed his employment and he changed his residence, did you consider those aspects in deciding whether it was necessary to put such an offer to Mr. X?

A. Well, I think that actually that's one of the items that we did discuss, I can remember that particular discussion and the idea that this was not the answer to his problems. That this information would somehow get out to people and he'd be placed in the same — and the additional thing I remember in this discussion was that he now had children, two young girls, and the effect that this would have if that got into the school where they were on the lives of those two young girls. That was another aspect that I — that you brought — that came back to me as a result of your question.

Mr. McGuigan later added that people sitting in the courtroom would

be able to identify Mr. X.

Inspector Shephard

As indicated above, Inspector Shephard was not present during the initial discussions about the idea of making the offer. He first learned about it in a telephone conversation with Detective Fitzpatrick after it had been first extended to the informants and rejected by them. In that conversation, he did not ask for, nor did Detective Fitzpatrick volunteer, an explanation why the offer had been made.³² However, in examination by Commission counsel, Inspector Shephard stated that, with the benefit of hindsight, he had come to the conclusion that in all probability the offer was given to the informants to boost their credibility. He said that no one had ever told him that. He agreed that it would have been beneficial to have had a means of shoring up their credibility.

The following day, Inspector Shephard retreated from his opinion. While agreeing that he was trying to be candid and truthful in offering his view, he felt that he had been unfair. He was criticizing three very competent Crown attorneys without any grounds for so doing. He had jumped to conclusions, he said, and did not know what was in the minds of the prosecutors. He had not considered the suggestion that the offer was made for compassionate reasons. He agreed that he had spoken to Detective Fitzpatrick between the time he offered his initial opinion and when he retracted it, and that Fitzpatrick had maintained that the offer was given for compassionate reasons. He said that that conversation had 'somewhat' factored into his change of view. Inspector Shephard also agreed that when he offered his initial opinion he had already known of Detective Fitzpatrick's point of view. Finally, Inspector Shephard agreed that he had not been taken by surprise when he was first asked why the offer had been made.

Fitzpatrick's Meeting with Ken and Janet Jessop

Ken and Janet Jessop both gave evidence at the Inquiry that they were once told by Detective Fitzpatrick that the offer was being made to the

³² Inspector Shephard could not explain why he had not asked Detective Fitzpatrick (or anyone else) for an explanation, even though he agreed that that would have been a natural question to ask.

informants in order to bolster their credibility. This evidence was disputed by many of the other parties before the Commission.

Ken and Janet Jessop testified that in August or September, 1991, Detective Fitzpatrick visited them at Ms. Jessop's home in . The visit was one of Detective Fitzpatrick's regular visits to Ms. Jessop to keep her informed of events concerning Mr. Morin's trial. Ken Jessop had only recently moved back in with his mother after having separated from his wife.

Ken Jessop testified that during the course of the visit, Detective Fitzpatrick mentioned that they were probably going to hear about the informants being given the choice not to testify if they did not want to. He assured the Jessops, however, that the offer was just being made to enhance the informants' credibility. He gave no other reason for the offer. He told the Jessops not to worry about it.

Janet Jessop testified that Detective Fitzpatrick told her and her son about the offer during this visit. He also told them that they might find out about it in the newspapers, but not to worry about it because it was just for show and to enhance their credibility. Detective Fitzpatrick said that the offer would make the informants 'look good.' Ms. Jessop did not recall Detective Fitzpatrick saying anything about the offer being made because the authorities felt sorry for the informants.

Detective Fitzpatrick denied ever having forewarned the Jessops that the offer was going to be made, or having told them that they were not to worry about it because it was only being made for show and to enhance the informants' credibility. In fact, Detective Fitzpatrick did not recall ever speaking to the Jessops about the offer. If he ever did speak to them about the offer, it would have been after the informants had testified.

The Jessops first told someone (their legal counsel) about this discussion with Detective Fitzpatrick shortly before they testified before the Commission. Both stated that they told their counsel after learning that Mr. Smith had testified before the Commission that the offer was made for humanitarian reasons. Ken Jessop learned about Mr. Smith's testimony through the media, whereas Ms. Jessop learned about it from her counsel.

The Jessops were cross-examined on why they waited to tell someone

until over five years after the event. Ken Jessop denied that he had heard about the debate over the genuineness of the offer before Mr. Smith testified. He said he was not present for the informants' testimony at the second trial, and did not receive newspapers reporting on the trial in the hospital where he was in early 1992. He may have seen news reports of the opening comments by Commission counsel with respect to the purported reasons for the offer, but he only glanced over them. He had read 'bits and pieces' of Kirk Makin's book on the Morin prosecutions, but did not recall whether he read something about the offer being a ploy. Ken Jessop further testified that he learned after he was released from the hospital that the offer had become public during the trial, but stated that he never thought about the discussion with Detective Fitzpatrick because events had unfolded as he had been told they would: the offer was made and it was declined. He never spoke to anyone about the discussion because there was nothing to talk about: "It was made plain and clear to us what it was, and there was no real discussion about it at all." He added that he would have been very upset and angry had he first learned about the offer through the media, and he would have raised the issue with the police or Crown. As it was, however, he was neither upset nor angry because he had been assured that it was just for show and to enhance the informants' credibility.

Janet Jessop similarly testified that she had never heard before Mr. Smith's testimony that the offer had been made for compassionate reasons. She said that she did not recall reading about the offer in the newspapers during the second trial, and she was not in Court when the informants gave evidence. She did not recall if she was advised of the position the defence was taking with respect to the offer. She never read Mr. Makin's book. She acknowledged that she had been kept informed by her counsel of 'things going on' at the Commission, but stated that nothing ever twigged her memory about her meeting with Detective Fitzpatrick.

The Jessops were also cross-examined on their ability to recall events from 1991. Both had admittedly been going through difficulties at the time. Ken Jessop separated from his wife in the summer of 1991, partly because he had resumed drinking after being sober for almost two years. About a week before Detective Fitzpatrick visited, he ceased drinking and started going to Alcoholics Anonymous meetings. He testified that he was not drinking at the time of Detective Fitzpatrick's visit. He resumed drinking in December, 1991 and tried to commit suicide in January, 1992. He was subsequently

imprisoned and then sent to stay at a psychiatric hospital for three months. This is where he was living during much of the second trial.

Ms. Jessop had her own problems during the second trial. Her marriage had broken up, she had financial problems, and her son was facing criminal charges, was drinking too much and had attempted suicide. Ms. Jessop agreed that her concentration was short at the time and her mind was occupied by matters other than the trial itself. She insisted, however, that she had a very good recollection of the meeting with Detective Fitzpatrick. She acknowledged that she often needed to refer to her written statement about the meeting (prepared over five years after the event) to answer questions about it, but stated that once she did, her memory returned. She had at one point in her interview with Commission counsel apparently indicated that the offer had been given for humanitarian reasons. She later corrected herself. She told the Inquiry that she was more comfortable recalling events in her home than on the witness stand.

Ms. Jessop stated that her memory had not been assisted by her son. Both Jessops testified that they recalled the meeting with Detective Fitzpatrick independently of each other, and advised their counsel of it before speaking to each other.

Ken Jessop acknowledged that after he learned that Mr. Morin was innocent, he felt as though he had been lied to for 10 years. He was upset at the people involved in the case, including the police and the lawyers. Ms. Jessop stated that she had become very close friends with Detective Fitzpatrick as a result of the case.

As indicated above, Detective Fitzpatrick and all three of the second trial prosecutors testified that the idea of the offer was first raised in December, 1991. This is several months after the Jessops testified that Detective Fitzpatrick told them about it. Mr. Scott testified that it was possible he could have thought of making the offer to the informants, and shared this thought with the police before December, 1991. However, he had no recollection of doing so.

Robert Jessop

Christine Jessop's father, Robert Jessop, testified that he first heard

about the offer through the media around the time that the informants testified at the second trial. He wanted to know why the offer had been made, so he contacted either the Crown or police to find out. He was told that the offer was made in response to the damage to the credibility of the informants which was anticipated by defence cross-examination. He was never told that the offer was made to enhance the informants' credibility, but drew his own conclusion in that regard:

I believe it's my own thought as to why an offer like that would be made in the first place, based upon...the fact that it was known that the defence attorneys were going to be very strenuous in their cross-examination of the two witnesses, and therefore, one that's testifying wants to be credible. And I would assume that — my thought was: Well, this must be why they've done it.

Mr. Jessop could not specifically say who advised him of the reason for the offer, but he was certain that he was never told that the offer was made for compassionate or humanitarian reasons. He would have been angry if he had been told that, and he never had that visceral reaction of anger.

Mr. Jessop met with Commission counsel on March 20, 1997, in preparation for testifying before the Commission. He was cross-examined about this meeting by counsel for Messrs. McGuigan and Smith:

Q. Well, did you not first say to Mr. Cooper, you didn't recall any specifics about the offer, and that no one told you why the offer had been made?

A. I might have said that on that particular day.

Q. And in response to that, Mr. Cooper then referred you to Mr. Danson's letter, and you responded by saying you got that information from the media. Do you recall that happened, you saying that?

A. Perhaps I did.

Q. And then Mr. Cooper saying, Mr. Danson's letter said you were told about this. Do you recall Mr. Cooper then saying words to that effect?

A. He may well have. If you've got it written down

there, I suppose he said it.

.....

Q. Okay. So it would be fair to say — my original question was, to be fair, that you might be, given the passage of time — I know you're trying your best, that you may well be confused about what you were told regarding the purpose of the offer?

A. I think that would maybe be fair to say.

Detective Fitzpatrick was asked whether he ever had a conversation in which he told Mr. Jessop that the offer was made in anticipation of attacks on the informants' credibility in cross-examination. He did not recall such a conversation, but said it was possible that he discussed the issue of credibility with Mr. Jessop.

The Informants

Mr. X testified that when he was given the offer not to testify, he felt that it was a genuine offer. He still believes that today. He did not know why he had been given the offer. No one told him why.

Mr. May testified that although he did not think that the offer was a ploy at the time he was given it, he now believes that it was. Mr. May had actually told his mother in July, 1994, that he thought the offer was a ploy, but he testified that he was lying to her at the time. It is only in hindsight that he now believes that he was correct. As usual, no reliance can be placed upon Mr. May's testimony, on any side of any issue.

The Crown's Response

Both Mr. McGuigan and Mr. Smith testified that if they had wanted to use the offer to enhance the informants' credibility, they would have disclosed it to the defence with a view to either heading off cross-examination about the informants' motives, or enabling the issue to be raised in re-examination. Mr. McGuigan suggested that this would have been much more clever than hiding the offer since (in his opinion) the defence would have inevitably attacked the motivations of the informants. Mr. Smith

suggested that it would have been inept to keep the offer a secret because one does not leave tactical considerations to chance.

Ms. MacLean agreed with the suggestion that it would have been foolhardy to have concocted a scheme wherein one would have to enlist the cooperation of two unstable persons like the informants. Mr. Scott was also asked about this, and said that it would be unwise to use informants in a scheme because they might turn on you.

Considering the Implications of the Offer

The three Crown attorneys who prosecuted the second trial were asked about a number of possible implications of giving the informants the choice whether to testify:

1. The Crown might lose the informants' evidence — the only direct evidence they had against Mr. Morin, whom they regarded to be a sadistic killer — and, as a consequence, also 'lose' the trial;
2. The proceedings might end in a mistrial — wasting the time and effort which had been put into the trial and pre-trial motions — because the Crown might not be calling witnesses who had been referred to in some detail in the prosecution's opening address to the jury;
3. The Crown would effectively delegate an important trial decision — whether to adduce the informants' evidence — to two witnesses of disreputable character who had bargained for their evidence;
4. The interests of the Jessops in convicting the murderer of their nine year-old daughter might be sacrificed to the interests of a con man and a sexual assailant;
5. Only Mr. May might have accepted the offer, leaving the prosecution with nothing but the evidence of the person who simply *overheard* the confession;

6. The public may have reacted adversely if Mr. Morin had been acquitted because the prosecution felt sorry for the informants;
7. The administration of justice may have been adversely affected by the unusual offer.

The Crown attorneys generally responded by stating that they failed to consider almost all of these implications, concentrating only on their humanitarian concerns for the informants. The evidence bearing upon these admissions is outlined below. This evidence bears upon the issue of whether Crown counsel failed to properly consider the implications of their decisions. It is also relevant to the credibility of their stated reasons for making the offer and the *bona fides* of the offer itself. The Morins argued that it stretches credulity to believe that three competent Crown attorneys, assisted by several experienced police officers, acted without any appreciation of the potentially serious consequences of their actions.

Losing the Informants' Evidence and the Trial

The most obvious potential impact of the offer was that it would be accepted and the prosecution would lose the informants' evidence. This, in turn, might have led to Mr. Morin's acquittal. The witnesses were asked about this possibility.

Mr. McGuigan stated that when the offer was being considered, no one ever discussed the fact that it might deprive the Crown of significant evidence — in fact, its only direct evidence — and let the murderer of a young child go free. He could not explain why not:

Q. Okay. Now, leaving aside the mistrial, we've heard that this was either significant or important evidence relied upon in your opening, and the only direct evidence in a less than overwhelming case. We've also heard that the officers and Sue MacLean had been working on the case against Guy Paul Morin since 1985. Was there any discussion at all that such an offer, if accepted, would deprive the Crown of the only direct evidence it had in the case?

A. No.

Q. Was there any discussion that such an offer, if accepted, would deprive the Crown of significant evidence that it relied upon in the case?

A. No.

Q. Well, was there any discussion that such an offer, if accepted, could cause a guilty man to go free?

A. No.

Q. Would you not expect that those would be topics discussed amongst Crown counsel in making a decision of this nature?

A. No. One might expect that, but it didn't happen. It just didn't — those items were not discussed. Why they weren't discussed, I don't know, but they weren't.

.....

Q. Okay. Well, leaving aside the absence of any discussion that such an offer would deprive the Crown of important or significant evidence it had in the case, was there any discussion that such an offer, if accepted, might allow not just any guilty person to go free, but a person who you believed at that time to be mentally ill, a child abductor, a sexual sadist and a violent killer?

I mean, I want to put it at its starkest terms possible. Is there any discussion about the fact that such an offer, while potentially humanitarian to the witnesses, could cause this sick, child abductor and murderer, as you regarded him back then, to be walking free in the community?

A. No.

Q. Would you expect — well, let me ask you this. If you believed that the offer might be accepted, wouldn't it concern you that it might cause such a killer to go free?

A. Well, if I'm working from the basis that the jury's not going to accept the evidence in any event, in my opinion, then I haven't lost much, from my perspective.

Q. Well, what I heard you say was that that was true for Mr. X, but not necessarily true for Mr. May. This is an offer that's being communicated or contemplated in relation to Mr. May as well.

A. Yes.

Q. So you might lose something very significant. So I guess what I'm asking you is: If you believe that the offer might be accepted, and let's just put in Mr. May here, wouldn't it concern you that it might contribute to causing a killer to go free?

A. Well, that was something that was not discussed and was not considered by me. Now, you can very justifiably argue that it's something that should have been considered, but I'm just telling you that that was not considered.

Mr. Smith stated that the Crown attorneys did not consider any of the implications of the offer, including the possibility of losing a very serious case:

Q. Well, was there any discussion amongst the Crown counsel or the investigating officers that this was a first degree murder case involving a nine-year-old child with sexual overtones; in other words, a most serious offence imaginable, and that the Crown was voluntarily exposing itself to an acquittal or a potential acquittal by foregoing evidence of a confession? I mean, did anybody ever talk about the implications of that?

A. No one talked about the implication, at all, and we — you know, obviously, we knew we were prosecuting a very serious case indeed, and we went about our task, I thought, in a very professional manner, and tried to do what we thought was right. If you tell me that potentially that could have been a very grave mistake, you're right. It could have been a very grave mistake. But frankly, sir, we did not think about it or discuss it at the time.

Ms. MacLean stated that someone asked "What if they accept the offer," but this did not translate into a discussion about losing the only direct evidence against Mr. Morin. They did not consider the possibility of an

acquittal. They did not assess what evidence was left in the absence of the informants. No one suggested that they could lose a first degree murder trial.

Detective Fitzpatrick agreed, at one point, that no one ever discussed the possibility of losing important evidence, and even the whole case, because of the offer. However, he said that he had been personally concerned about this. He thought that the informants' evidence was the prosecution's most important piece of evidence, although he felt the prosecution still had enough evidence to convict without it. He also testified that he may, in fact, have voiced some concerns over the impact of the offer. He could not recall how the Crown attorneys reacted when he did so. None of them remembered Detective Fitzpatrick, or any other police officer, raising any concerns about the offer. In hindsight, Detective Fitzpatrick felt that he should have voiced his concerns more strongly.

Inspector Shephard felt that the offer could have had a serious impact on the prosecution since the informants' evidence could have been lost. When Detective Fitzpatrick told him about the offer (after the informants had already rejected it) he was concerned that the informants might change their minds before they testified and accept the offer. He agreed that he had never raised his concerns with the three prosecutors, and could not explain why he had not.

Mr. McGuigan agreed that the case against Mr. Morin was not an overwhelming one. He stated that a prosecutor needs to have ample other evidence before he or she can decide not to call the evidence of a jailhouse informant, and acknowledged that the Morin prosecution was not one of those cases. He stated that since jurors often do not trust informants, the Crown only calls them when they are needed. He insisted, however, that he had not felt that the risk in making the offer was that substantial. He pointed out that calling unreliable informant witnesses can tarnish the entire Crown's case. He had also thought it unlikely that the jury would believe the informants in any event, especially Mr. X who had a history of sexually abusing young children, hearing voices and seeing people with no legs. He acknowledged that he had thought it more likely (though not certain) that Mr. May would be believed, but stated that he had simply failed to consider the impact of losing May's evidence. He further acknowledged that Ms. MacLean had thought that Mr. X would be of assistance to the prosecution. He testified that her opinion was not discussed when the decision to give the

offer was made.

Mr. Smith expressed similar sentiments in his evidence. He testified that it was hard to assess the effect of the informants' evidence on the prosecution's case as a whole because, although it was important evidence in a difficult case, it was also problematic evidence. The jurors might think that the informants acted out of self-interest. The informants had unfavourable criminal records. The psychiatric evidence suggested that Mr. May was a pathological liar and Mr. X heard voices. Mr. Smith had not considered the informants' evidence to be the most important evidence for the prosecution. At the same time, Mr. Smith testified that the decision to make the offer was a very important decision. He also felt that it was not appropriate for the prosecution to hold back evidence simply because it might not be necessary to secure a conviction. Necessity is not the standard to be applied, and a prosecutor never knows when he or she has enough evidence for a conviction.

Ms. MacLean acknowledged that losing the informants' evidence would have had an impact on the prosecution, but felt that there had been a lot of other indirect evidence pointing to Mr. Morin's guilt. She had also felt that the informants' evidence was vulnerable. At the same time, however, she had been more optimistic that Mr. X's evidence would be accepted. She had been concerned that he might accept the offer, but hoped that moral considerations would impel both informants to do the 'right thing.'

The Possibility of a Mistrial

When Mr. McGuigan gave the prosecution's opening address to the jury, he referred in some detail to the informants' evidence. If the informants had accepted the offer, the jury would never have heard their evidence. All three Crown attorneys accepted that this might have caused a mistrial.³³

The evidence was uncontradicted that the possibility of a mistrial was never considered by the prosecution before the offers were made. Mr. McGuigan, for example, testified:

³³ Mr. McGuigan qualified this by suggesting that the defence may have been pleased by the turn of events, since the jury would not hear from witnesses that the prosecution had referred to. I have some difficulty with that suggestion.

Q. You had already told the jury in November of 1991, that they would hear this evidence of a confession by the accused. And I take it you'd agree that if this offer was a legitimate one and if accepted by the witnesses, could generate a mistrial of a case that had commenced some months before.

A. That was potential.

Q. Well, did you ever consider that this offer that was going to be made, or was being discussed, could generate a mistrial of the case?

A. First time that I considered it was when we were arguing in court and Mr. Pinkofsky indicated this was mentioned in the opening, and therefore would be grounds for a mistrial. That's the first time the light went on.

Q. All right. Was a concern — your answer probably answers this one as well, but was a concern raised by any of the Crowns or police officers in your presence that making such an offer to these witnesses could generate a mistrial of this lengthy case?

A. No.

Mr. McGuigan stated that he certainly would not have wanted a mistrial, given how much time and effort had already been put into the prosecution, and that if he had considered the possibility, he would not have extended the offer to the informants.

Mr. Smith testified:

Q. Well let's look at the ramifications, from all angles, that you never apparently considered. Now, apparently the others never considered because if they had, they would likely have communicated it to you. All right? First of all, let's look at it from the point of view of, let's suppose that both of them had accepted the offer and said: Mr. McGuigan, it's a belated Christmas present now and we'll accept it. All right? You follow?

A. And so they both would have said we're not going

to testify.

Q. You got it.

A. Right.

Q. All right. Well, at this point in the proceedings, sir, and bear in mind you haven't considered the ramifications of this, you haven't and as far as you know, none of the others have. First of all, this is taking place in the context of a case where there has already been a very lengthy stay application brought by the defence that has consumed more than seven months of court time. Correct?

A. Yes.

Q. That has been followed, sir, by a series of pre-trial motions that have consumed between four and five months of court time.

A. Fair enough.

.....

Q. Okay. So you add all that up, you're into 16 months of court time has already been used up on this case.

A. Okay.

Q. Of the second trial. The resources, sir, that had been put into this case — just from that perspective at this point in time, are enormous. Agreed?

A. Sure.

.....

Q. Yes. And then of course, you have to now factor in, as well, the fact that this case has been going on at this point, for seven years. The prosecution of Mr. Morin's been going on for seven years through court after court. Okay? In previous trial, Court of Appeal, Supreme Court of Canada, Supreme Court of Canada, Supreme Court of Canada, three times Supreme Court

of Canada. And now we're back with all this 16 months of trial. And of course, you had all been quite troubled, had you not, sir, I mean, it's natural is it not that you were all troubled? That maybe the defence would win the stay application.

A. Troubled by it?

Q. Yes, of course. Weren't you? Or were you always a 100 per cent confident that you'd win it?

A. I guess it depends what you mean by "troubled by" it. I mean, we went on with our trial preparation ---

Q. (Inaudible)

A. And we would have heard whether they was a stay or not at the appropriate point. When you say troubled by it —

Q. You were worried you could lose, is what I mean by that.

A. Oh sure. We certainly realized that there was some risk of a stay, sure.

Q. That's all I mean by "troubled by".

A. Yes.

Q. And the implication, sir, given that background, is that first of all, if the two of them had accepted the offer — and we're assuming for the moment it's a genuine offer, which of course you say it is, that it would hardly have been unexpected if the defence had brought an immediate application for a mistrial, given the opening address of Mr. McGuigan.

A. Well, I think that's fair. I lost count of how many applications there were for mistrials.

.....

Q. And of course, sir, I would suggest that a further application — and we've always tended to focus on a mistrial application, a further application that could

well have been brought by the defence in this circumstances, would be a further application for a stay of proceedings. Because the Crown has effectively aborted a second trial 16 months into the trial, and we're now eight years after the event.

A. Well, I think I can fairly say that if there had been a mistrial, it would be astounded me. If there was a mistrial that was occasioned by the conduct of the Crown, it would have astounded me if Mr. Pinkofsky had not brought a stay application.

Q. And equally, sir, would I be right in saying that it would have given you cause for considerable concern that on this occasion he might actually be successful?

A. Well, frankly, I didn't turn my mind to that —

Q. I know you didn't. I'm talking about the actual ramifications, not what you thought about because you said you didn't think about this. I'm just looking at the actual ramifications. At the end of it, I'm going to put to you that it's inconceivable that you didn't consider these things, but, we haven't got to that. I just want to look at what the actual ramifications were, now we're looking it.

A. I don't know if I can concede that a stay would have been inevitable.

Q. I didn't say that. The question was: You would have had cause to be extremely concerned that a stay might indeed be granted if such an application were brought in these circumstances?

A. Fair enough. I mean, I was concerned about every stay application Mr. Pinkofsky brought and there were a number of them.

Q. All right, but this one —

A. I didn't mean that I thought they necessarily had merit.

Q. No, but this one you might have thought had a great deal more merit than your opinion of some of the

others?

A. I'd certainly concede that there would be an arguable position, sure.

Q. So, in other words, blindly, on your evidence, unknowingly, you have — and I say you, generically ... have taken a decision that could very likely lead to a mistrial and equally, possibly, lead to a stay of proceedings on account of Crown ... Would you have done that unknowingly?

A. When you say very likely, again I don't want to quibble, but could have, sure.

Q. Yes. All right. But unknowingly. You've walked into this.

A. Without applying my mind to that issue, yes.

Mr. McGuigan was cross-examined on how he could not have considered the possibility of a mistrial. He agreed that the offer was first considered within two and a half to four weeks of the opening, but stated that he usually forgets all about his opening once a trial gets underway. Mr. Scott felt somewhat differently:

Q. Don't you think, sir, that your mind would have strayed back to the opening address?

A. I would like to hope so ...

Q. You don't think, sir, that any seasoned prosecutor — and really any unseasoned prosecutor would realize immediately that there's a significant problem there?

A. I would like to hope so.

Mr. McGuigan was referred to submissions he made at the trial on January 20, 1992, in response to a defence application to defer cross-examination of Detective Fitzpatrick and Inspector Shephard about the informants until after the informants had testified. Mr. McGuigan argued that the topic was not new and had been raised in the prosecution's opening address. Mr. McGuigan denied that his submissions indicated that his

opening address remained in his mind in responding to issues at trial. He explained that (according to his recollection) a firm decision on whether to make the offer had not yet been made, and his submissions concerned an issue entirely unrelated to the offer.

Improper Delegation of the Decision

It was suggested to the Crown attorneys that by making the offer they had in effect delegated — improperly — an important trial decision to the informants, *i.e.* whether to adduce their evidence. All three agreed that this issue had not been considered, but generally felt that the suggestion was invalid. They did not feel that they had delegated a trial decision. Mr. McGuigan stated that the decision to extend the offer was made by the Crown, not the informants. Ms. MacLean testified that the offer was a product of the Crown's decision on how to best conduct the prosecution. Mr. Smith pointed out that the prosecution is always at the mercy of witnesses concerning what evidence they choose to give.

The Jessops

All three Crown attorneys agreed that they neither consulted with the Jessops nor considered the Jessops' interests before deciding to make the offer. Ms. MacLean, for example, testified:

Q. So as of December 4th of 1991, madam, of course, you and others, but you in particular, had devoted a very substantial part of your career to the prosecution of Guy Paul Morin; correct?

A. Not by choice, but that's what happened, yes.

Q. And you accompanied — you both had been and were still being accompanied by Crowns and police officers who were both highly skillful?

A. Yes.

Q. Highly motivated?

A. Yes.

Q. And you've got some police equally highly motivated, Fitzpatrick, Shephard, Chapman?

A. To do the right, thing, yes.

Q. Well, highly motivated in the prosecution of Mr. Morin, is what I mean by that. You all believed that Mr. Morin had killed Christine Jessop?

A. Yes.

Q. So you were highly motivated to try and satisfy a jury that Mr. Morin had killed Christine Jessop?

A. Yes.

.....

Q. This group of people, madam, you would say and have us believe, as a result of one social occasion, discussion with what would seem to be very little debate, agree unanimously, without dissent, to place the sensitivities of a con man on the one side, and a pedophile on the other side, before the sensitivities of the Jessops; correct?

A. The issue of the Jessops didn't come up.

Q. So they place the sensitivities of these two individuals before the sensitivities of the Jessops, without thinking about it, without realizing what they were doing?

A. We didn't talk —

Q. When I say they, I mean you?

A. We didn't talk about the consequences to the case, we didn't talk about mistrial, we didn't talk about the Jessops or the public's reaction. We were talking about what was fair to these men as witnesses.

None of the Crown attorneys offered an explanation for why they failed to consider the Jessops' interests, but they did defend the decision not to tell the Jessops about the offer. Mr. McGuigan testified that he did not tell

the Jessops because it was a matter of Crown discretion, the Jessops were just interested generally in how the trial was progressing, the Jessops may have caused problems by going to the media, Ms. Jessop might have accidentally averted to the offer in her testimony, and the informants' rejection of the offer may have influenced Ms. Jessop's testimony by strengthening her beliefs in Morin's guilt. Ms. MacLean agreed that the Crown had to be very cautious about discussing trial matters with the Jessops when they were witnesses in the trial and there had been an order from the trial judge excluding all witnesses from the courtroom.

Miscellaneous

Several other potential implications of the offer were raised in the questioning of the Crown attorneys. They are grouped together here.

They did not consider what the public's reaction might have been if the informants had accepted the offer and Mr. Morin had been acquitted. Messrs. McGuigan and Smith pointed out, however, that they would have been held equally accountable if they had decided not to call the informants because of reliability concerns.

They did not consider the long term effects on the administration of justice by choosing not to call witnesses because of the cross-examination they faced. It was suggested that the offer might prevent similar informants from coming forward in the future. Ms. MacLean testified that she did not think the Crown attorneys were tainting the administration of justice. On the contrary, they were giving it integrity by treating witnesses with decency.

Mr. McGuigan was asked whether he ever considered the possibility that only Mr. May would accept the offer. He responded that he had not (nor had any of the Crown attorneys). He agreed that this would have posed a serious problem, in that Mr. May was the person who supposedly had the actual conversation with Mr. Morin. Mr. X had only overheard the alleged confession.³⁴

³⁴ If only Mr. X testified to the confession, the jury might be left wondering why the actual participant in the conversation did not testify and confirm what X said he had overheard. The jury might speculate that Mr. May did not hear any confession, and therefore more easily conclude Mr. X was lying (especially in the face of Mr. Morin's denial).

The Crown's Responsibilities

All three Crown attorneys acknowledged to a greater or lesser extent that they should have given more thought to the potential ramifications of the their decision to make the offer.

Mr. McGuigan stated that it was a mistake not to consider the possibility that the offer could result in a mistrial. He also stated that he should have considered the impact of losing Mr. May's evidence. If he could do it over again, he would have disclosed the offer to the defence, and used it in re-examination if circumstances permitted. His only explanation for why the Crown attorneys failed to consider so many implications of the offer was that they acted stupidly.

Mr. Smith said that the decision to make the offer was a very important one, and that the Crown attorneys did not discuss the possible ramifications of the different possible responses. He accepted that they exposed themselves to the possibility of a mistrial, and that he had not applied his mind to that issue.

Ms. MacLean stated that the prosecutors had been obliged to think through the possible implications of the offer, but failed to do so. She said that the whole issue was not discussed as thoroughly as it should have been. She could not explain why they failed to consider the possibility of a mistrial.

Fitzpatrick Communicating the Offer to the Informants

Detective Fitzpatrick was the first to tell the informants about the offer. He did so at the request of the prosecutors. An issue before the Commission was whether Detective Fitzpatrick was meant to act as a kind of advance scout: advising the informants that they *might* be given the offer in order to learn what their responses would be before the Crown attorneys decided whether to make the offer official at a later date. All three Crown attorneys denied that this was their intention.

Fitzpatrick's Instructions

Detective Fitzpatrick testified that he did not tell the informants about the offer as part of a ploy. No one suggested that he find out how the

informants would respond to an offer and then report back to the Crown with what he learned. At the same time, however, he testified that he was instructed by the Crown attorneys as follows:

Q. All right, so you were sort to convey to May and Mr. X that the Crown may make this offer to you, and you fellows should think about it so when you come down to be interviewed by the Crown, you'll have some sort of an answer?

A. Yes.

Mr. McGuigan disagreed with Detective Fitzpatrick. He testified that he instructed Fitzpatrick in the following terms:

I instructed Fitzpatrick that: If they're going to accept this offer, then there's no sense in bringing them down. So what I want you to do is twofold, is to make this offer to them, and tell them that the Crowns will be making the offer to them when they arrive in the event that they don't accept it right away.

Mr. McGuigan stated that Detective Fitzpatrick was not instructed to tell the informants that the Crown *might* make the offer. Although the issue may not have been discussed in terms that distinguished between a firm and a conditional offer, Detective Fitzpatrick knew that it was a firm offer.

Mr. Smith and Ms. MacLean generally supported Mr. McGuigan's version of the events. Both said that Detective Fitzpatrick was not instructed to put the offer as a conditional offer. On the contrary, he was to advise the informants that the Crown would be making the offer, and that the informants should think about their response before they met with the Crown attorneys to discuss it. Mr. Smith added that it would have been foolish to have Detective Fitzpatrick float the offer as a trial balloon: the informants were not the type of people you could make an offer to and then retract it if you did not like their response.

How Fitzpatrick Conveyed the Offer

Detective Fitzpatrick could not recall the exact words that he used to convey the information about the offer to the informants. He agreed,

however, that he used words along the lines of: This is something the Crowns might do. How would you respond?

Mr. May testified that Detective Fitzpatrick indicated it was possible that the Crown would make the offer, and he was wondering how May would react. Mr. May later conceded that he could not definitely state what words had been used by Detective Fitzpatrick.

Mr. X did not recall how Detective Fitzpatrick phrased the information about the offer. He agreed, however, that he had previously stated: "I believe Bernie Fitzpatrick mentioned to me that he thinks the Crown is going to give me the chance to back out."

A Final Decision?

A premise behind the allegation that Detective Fitzpatrick was to act as an advance scout is that Crown counsel had not yet decided whether to make the offer to the informants; their final decision would depend on how they thought the informants might respond. Detective Fitzpatrick testified that he was not sure whether the Crown attorneys had finally decided whether the offer should be made when they asked him to speak to the informants.

All three counsel testified that when Detective Fitzpatrick was asked to tell the informants about the offer, a final decision had been made to make the offer. There was a conflict in their testimony, however, as to when that was. As reflected above, Messrs. McGuigan and Smith thought that the offer was discussed on more than one occasion. Mr. McGuigan stated that the final decision to make the offer, and to have Detective Fitzpatrick convey it, was not made until late January, 1992. Mr. Smith testified that Fitzpatrick was asked in February, 1992 to transmit the offer. Ms. MacLean and Detective Fitzpatrick, however, testified that there was only one meeting about the offer, in December, 1991, and that Fitzpatrick was asked at that meeting to tell the informants. The significance of this difference was minimal in terms of Detective Fitzpatrick's testimony, as he testified that he did not speak to the informants until early February, 1992. Ms. MacLean, however, suggested that Detective Fitzpatrick had to be wrong about that date since she spoke to Mr. X about the offer in mid-January and X indicated that Fitzpatrick had already spoken to him. Mr. McGuigan agreed that if Detective Fitzpatrick had conveyed the offer to the informants before late January, the most he

could have told them was that the Crown might be making the offer. He did not recall asking Detective Fitzpatrick in December, 1991 or early January, 1992 to raise the offer with the informants.

Why Fitzpatrick Was Asked to Convey the Offer

The three Crown attorneys were asked why Detective Fitzpatrick was asked to tell the informants about the offers. It was suggested to Mr. McGuigan that it would have been more logical for Crown counsel to advise the informants, if they really wanted the offers to be rejected, since the informants did not particularly like the police.

Mr. McGuigan stated that he was not sure that he knew the informants disliked police when he asked Detective Fitzpatrick to convey the offer, although he agreed that most inmates do. He said that Detective Fitzpatrick was asked simply because it was practical: Fitzpatrick would be contacting the informants to arrange for them to come to London (in preparation for their testimony) and if the informants had accepted the offer they would not have been brought down. Detective Fitzpatrick was chosen over Detective Chapman because he knew the informants better. Mr. McGuigan denied that Detective Fitzpatrick was chosen because he would present the offer in such a way that the informants knew they had no choice but to reject it.

Mr. Smith and Ms. MacLean stated that the Crown attorneys wanted the offer communicated in advance so the informants could give it serious thought. According to Mr. Smith, Detective Fitzpatrick was chosen simply because the police were assisting the Crown in arranging the affairs of witnesses.

Detective Fitzpatrick testified that he was asked to tell the informants about the offer so that they would have a chance to think about it before Crown counsel discussed the issue with them. He could not recall why he, rather than someone else, was chosen to act as the messenger.

The Crown Attorneys Communicating the Offer to the Informants

Mr. Smith formally made the offer to Mr. May in mid-February, 1992. Detective Chapman was present. Neither could recall exactly what was said to Mr. May, but Mr. Smith was confident that they discussed the fact that

Mr. May would be facing a searching cross-examination if he testified at the trial. Detective Chapman did not think they made the offer to Mr. May only after making him feel good about his proposed testimony, thereby minimizing the chances he would accept. Mr. Smith testified that Mr. May responded by saying that his family was not keen on him testifying, but that he could not look at himself in the mirror if he did not.

The evidence varied somewhat over when the Crown formally made the offer to Mr. X. Mr. X thought that it was in February, 1992, when all the prosecutors were present. Messrs. Smith and McGuigan had a similar recollection. Ms. MacLean accepted that such a meeting occurred, but said that she had already made the offer to Mr. X on January 13, 1992. She was able to pinpoint the date by looking at her hotel bills, and because she knew Detective Fitzpatrick had been testifying in court and she had been alone with the Crown's law student. Ms. MacLean did not know why the offer was extended to Mr. X for a third time in February, but thought it might have been because Mr. McGuigan, as lead prosecutor, wanted to reaffirm X's feelings. She also testified, however, that Mr. X's response in January was clear. Mr. McGuigan could not assist on this issue because he said he was not aware that Ms. MacLean had ever discussed the offer with Mr. X in January.

Ms. MacLean stated that when she discussed the offer with Mr. X in January, the issue came up only briefly and rather informally. She explained to X that the offer was being given because he had suffered as a result of testifying at the first trial, and because he was facing a difficult experience in testifying at the second trial. Mr. Smith said a similar conversation occurred at the February meeting with X.

Ms. MacLean was asked why she had waited until January 13th to discuss the offer with Mr. X, when she had met with him for two hours the day before, which time would have been wasted had Mr. X accepted the offer. She suggested that it might have been because the Crown attorneys had planned to raise the issue as a group with Mr. X later on, but X then brought it up himself at the meeting of January 13th.

The Crown attorneys were asked why they bothered to reiterate the offer after the informants had already rejected it when speaking to Detective Fitzpatrick. Mr. Smith explained that they had promised to personally discuss the offer with the informants, and had wanted the informants to take some

time to think about it. Mr. McGuigan stated that he and his colleagues thought the informants might put more faith in an offer coming from them (as opposed to the police). He also testified that they wanted to ensure there was no misunderstanding about the offer, and to give the informants a chance to change their minds. He added that if the offer had not been sincere, they would not have repeated it. (The opposite side of the coin was also raised in evidence — if a genuine offer was already declined, why repeat it to witnesses whose evidence you wish to tender?)

The Informants' Responses to the Offer

Why the Offer Was Rejected

Mr. X could not really say why he rejected the offer. He insisted, however, that he was not participating in a game that the authorities were playing. He agreed that he was concerned about how testifying would affect his safety. He also knew that the defence had access to his psychiatric records, and that he was going to face an embarrassing cross-examination at the trial. He said:

Q. Okay. Isn't it true that you really didn't want to testify?

A. I really can't answer that. I've been at two trials, and whether or not I wanted to testify, I went through with what I set out to do and that was to tell the truth.

Mr. May testified that he did not want to testify at the second trial, and that he knew he was going to be 'dragged through the mud' if he did. He insisted, however, that he took the offer seriously. When asked for a reason why he rejected it, he said:

Q. [I]f you really didn't want to testify at the time, why did you tell Bernie Fitzpatrick to "stuff it" if you really had an option? ...

A. I was under subpoena to testify and I don't think it's up to Mr. Fitzpatrick to tell me whether I can or cannot testify at a trial, it's entirely up to the court.

Q. Up to the court. Well, why did you then, as you've

told us, really want to testify and be put through all this hardship, and I can understand that, sir. Why did you tell Alec Smith in London when he put the offer to you before your testimony, why did you say to him, "No, I want to go through with it"?

A. Because I knew that what was said to me was true and I wanted to testify in court to that fact. As much as I disliked the fact that I was going to be dragged through the mud, which I was well aware was going to happen. I mean, I have an obligation to testify.

Q. I don't quite understand your position. You told us five minutes ago that really didn't —

A. On one hand I don't want, I didn't want to testify, but on the other hand I felt that I had to testify.

Q. You felt that you had to testify, and you were under subpoena?

A. I was also under subpoena, yes.

The Crown's Knowledge of the Informants' Response

The Crown attorneys made the offer to the informants in early 1992. Evidence was adduced as to whether they knew in advance what the informants' responses would be. This evidence bore upon the issue of whether the Crown had used Detective Fitzpatrick as an advance scout so that they could make the offer secure in the knowledge that it would be rejected.

All the Crown attorneys testified that originally they were not sure how the informants would respond to the offer. All of them also testified that before they personally extended the offer to the informants they had learned that the informants had already rejected it when speaking to Detective Fitzpatrick. Mr. Smith added that Detective Fitzpatrick had told them that at least one of the informants had rejected the offer in fairly emphatic terms. Ms. MacLean agreed that, in light of that information, when she put the offer to Mr. X she had not been too concerned that he was going to accept it.

How and Whether the Offer Would Come Out at Trial

As indicated above, the offer came into evidence at the second trial when Mr. May mentioned it in response to the last question asked of him in re-examination by Mr. Smith. The question and answer were as follows:

Q. You were questioned, sir, about, extensively about your motivation back in 1985 or 1986 and were asked a lot of questions about the sort of deal you made, first of all, to be body packed and what not. In any event, can I ask you, sir, presently, do you expect to be given or do you hope to gain any advantage at all from either the Crown or the police as a result of coming to court and testifying in this trial before this jury?

A. Absolutely not. As a matter of fact, it's been indicated to me or was indicated to me from the Crown and the police and they gave me every opportunity to back out of this without fear of harassment or having any type of charges laid against me. I told them to forget it.

Q. Thank you sir, those are my questions.

After the issue was raised, Mr. Pinkofsky applied for and received the right to re-cross-examine Mr. May. He later applied to the judge for a mistrial, or an instruction to the jury that they were to disregard May's evidence on the issue. Mr. Smith successfully resisted these applications, arguing that the evidence was admissible in response to the defence allegation (in cross-examination) that the informants were under the power of the police. Mr. Pinkofsky also applied for disclosure of all discussions with the informants concerning the offer. Mr. Smith responded that there was no record of the discussions, but advised the trial judge that the offer had been made for compassionate reasons. The Crown also had Detective Fitzpatrick prepare a will-say of his involvement.

All three Crown attorneys testified that they did not intend to lead the offer as evidence in the second trial. Mr. Smith said that he did not expect Mr. May to mention the offer in response to his question. He felt that the answer was unresponsive to the question. He had asked whether Mr. May hoped to gain something by testifying, and only expected Mr. May to respond

by stating that he did not. Mr. McGuigan agreed that Mr. May's answer was unresponsive. Ms. MacLean testified that she interpreted Mr. Smith's question as: "Do you expect future favours if you get into trouble again?"

Mr. Smith agreed that he fully intended to re-examine Mr. May on the issue of what benefit, if any, May had received at the second trial, since that issue was a substantial element of the cross-examination. He had also planned to leave that issue to the end of his re-examination. He acknowledged that, in hindsight, it was not surprising that Mr. May mentioned the offer at the end of his re-examination.

Mr. Smith was asked about a note he made for the purposes of Mr. May's re-examination. The note reads:

- has no outstanding charges
- has not been charged with a criminal offence since
pled guilty to assault in 1985.
- knew that embarrassing details of past would be
disclosed and would be cross-examined re background.
- question re motivation in 1985 and 1986
- have you been given or do you expect to be given any
advantage by the Crown or police as a result of your
attendance to testify before this jury.
- Why are you here?

Mr. Smith agreed that the note reflected his thoughts on how to address issues in re-examination. He further agreed that the second last sentence was very similar to the last question he actually asked in re-examination. He denied, however, that the last sentence ("Why are you here?") reflected an intention on his part to raise the fact that Mr. May was testifying voluntarily — the need for which was obviated by May's response to the second last question. He was not sure that he had ever intended to ask the question, since, unlike the other questions in the note, it was followed by a question mark.³⁵ He suggested that, in any event, the last question would

³⁵ Mr. Smith could not actually recall why the question mark was there.

have elicited a response about feeling a moral obligation to testify, not about testifying voluntarily. He also would not have wanted to open up a new issue for further cross-examination by the defence, since he felt that Mr. May's evidence had gone quite well.

Preparation of the Informants

Mr. Smith was responsible for preparing Mr. May to testify. He told the Inquiry that he did not discuss with May the option of raising his voluntary status in response to questions at trial. He did not discuss or suggest the answer that May gave in re-examination. He did not even prepare Mr. May for re-examination; in fact, he has never prepared a witness for re-examination. Mr. Smith did acknowledge, however, that he discussed the general issue of Mr. May's lack of motivation to lie:

Q. You don't think you took him through in preparing him for his evidence, why he would be saying now, rather you would take him through in preparation for his questioning the fact that he didn't have motivation to lie now, whereas he did have motivations back in 1985?

A. That general issue would have been dealt with, sure.

Q. Well, that's what the question really was in re-examination, it went to that, didn't it?

A. I think that's fair.

Q. And I guess you'd tell us that in preparing him for that type of question, he never said to you, well, of course, you've made me this offer and I've turned it down, so it's obvious that I haven't got a motivation to lie. He said it in answering a question, I'm wondering if he said it while you were preparing him for this type of question before he gave his evidence.

A. Well, first of all, Mr. Lockyer, I don't have a clear recollection of everything I asked of Mr. May and everything he said to me, but I can say quite certainly that, in fact, it was not said.

Detective Chapman was present during Mr. May's preparation. He testified that he did not recall Mr. Smith ever telling Mr. May to 'slip in' something about the offer. He added that he would recall that, had it occurred.

Mr. May testified that no Crown attorney or police officer suggested that he mention the offer in Court. No one suggested anything except that he tell the truth. The offer just came out in response to questioning by Mr. Smith.

Ms. MacLean was responsible for preparing Mr. X to testify. She testified that the Crown attorneys had discussed the general issue of the informants' right to state in response to questions in cross-examination that they were testifying voluntarily. Regarding her conversations with Mr. X about the issue, she said this:

A. I don't recall clearly what was said about that. I think that Mr. X may have raised the issue, and all I can recall is something about: "I am not going to lead it from you and if some issue comes up about it, just tell the truth"...That's as much as I recall, I don't recall any further discussion about it. I know I didn't say: wait for this question, give this answer, nothing like that happened.

Ms. MacLean added that she told Mr. X to only mention the issue if asked about it.

Mr. X testified that he was advised that he could mention the offer if he wanted to. He was told to tell the truth if asked about it, and that there was no reason to hide the offer. He may have been the one to raise the issue with the Crown but no Crown attorney ever told him what to say. He was never told that the offer was his 'ace in the hole' in terms of his credibility.

Mr. McGuigan had no direct involvement in the preparation of Messrs. May and X, so he could not testify as to what they were told in advance of their testimony. He did not know that Ms. MacLean had told Mr. X that he was entitled to refer to the offer if the defence raised his motivation to lie. On the contrary, he assumed that the informants were told not to mention the offer. The Crown attorneys talked in December, 1991 about the

fact that the offer was not to come up in Court, and Mr. McGuigan believes that he would have instructed Mr. Smith and Ms. MacLean to advise the informants of that. Both Mr. Smith and Ms. MacLean testified that no such discussions ever occurred.

Discussion Among Crown Counsel

As reflected above, Ms. MacLean testified that the Crown attorneys discussed the informants' right to say they were testifying voluntarily. She also acknowledged that it was anticipated the offer might come up if the defence raised the issue of the informants' motivations for testifying. Mr. McGuigan testified that there was no discussion about the informants' right to say they were testifying voluntarily. Mr. Smith stated that no Crown attorney in his presence discussed the potential use of the informants' voluntary status in response to questions in cross-examination.

Mr. McGuigan testified that he never discussed Mr. May's re-examination with Mr. Smith. He never told Mr. Smith (or Ms. MacLean) not to raise the offer in re-examination, but it was understood among the Crown attorneys that the offer was to remain a secret. He also could not see how the offer would come out in re-examination if it did not come out in cross-examination on the issue.

Ms. MacLean testified that she did not think the Crown attorneys discussed that it would be relevant to elicit Mr. May's voluntary status in re-examination. She could not be certain about this, however, because she could not clearly recall their conversations.

Mr. X Mentioning the Offer

Mr. X testified after Mr. May at the second trial. He also mentioned the offer. He did so, however, in response to a question in cross-examination.

The day before Mr. X mentioned the offer, and in the middle of his examination-in-chief, the Crown sought and was granted permission from the trial judge to speak to Mr. X in private. It was suggested that the Crown did this so that Ms. MacLean could remind Mr. X to mention the offer in cross-examination. Ms. MacLean denied this. She testified that she simply told Mr. X to remain calm, think about his answers and tell the truth. She said that she

could not have spoken to Mr. X about the fact that Mr. May had raised the offer in re-examination because there was an order from the trial judge excluding witnesses from the courtroom. Detective Chapman was present during Ms. MacLean's conversation with Mr. X. He made notes of the conversation. His notes did not refer to the offer being discussed.

The Crown Attorneys' Responses

Mr. Smith responded in two ways to the suggestion that the Crown set a trap for the defence. First of all, he stated that if he had intended to lead the evidence of the offer, he would not have left it to chance. He would have disclosed the offer to the defence so that he would be fully entitled to address it in re-examination (if the defence still decided to pursue in cross-examination the issue of the informants' motivations for testifying). Second, Mr. Smith stated that the allegation that the Crown set a trap rests on the faulty assumption that re-examination would necessarily be the witness' last word at the trial. In reality, the defence was often permitted to re-open its cross-examination after the Crown's re-examination, and was permitted to do so after Mr. May's re-examination.

Mr. McGuigan also argued that the allegation of a trap did not make sense. If Mr. May had been schooled to bring up the evidence of the offer, he would have done so in cross-examination, rather than through an unresponsive answer in re-examination. Mr. May's conduct, therefore, supported the position that the offer was to remain a secret. When asked how he expected the informants to respond to the suggestion that they were only testifying because they had to, Mr. McGuigan responded as follows:

Q. [I]f you saw that Mr. X or Mr. May were being cross-examined in a way that raised the offer directly, like: The only reason you're here is because you're forced to be here under a subpoena, you're compelled to come here and give evidence?

A. Well, the situation is that when this offer was made, we were well aware that they would be cross-examined in that fashion, and as I have indicated to you, if tactics had been the issue, it would have been done differently. It would have been disclosed, and then it would have been utilized in re-examination.

Q. But if you were aware that the cross-examination was coming, that Mr. Pinkofsky inevitably was going to ask something along the lines that Mr. Ruby had asked, namely: You're only here because you have to be here. You have to maintain the story, and you have to be here. How did you expect Mr. X and Mr. May to respond to that question?

A. Well, they were not — as far as I was concerned, they were not to refer to the fact that they had been given this option, and had turned it down. It's — had we been again thinking in a logical fashion, I would have done it the opposite way in which we would have made disclosure and utilized it in re-examination. If I had this to do over again, first of all, I wouldn't mention in the opening that we were calling these people.

If the situation arose where an offer like that was to be made, and not necessarily out of humanitarian reasons, but maybe because you have some doubt about the credibility of the witnesses, you place that offer to them, you disclose it, and then you can use it in re-examination. And that's the manner that, if this had been a long-standing plan of ours, then that's how we would have done it, and it's perfectly proper, perfectly legitimate, in my respectful submission.

.....

Q. But I guess that still leaves us with Mr. X or Mr. May's question. I mean, what would you tell them about that, that they have to lie and say: I'm compelled to be here?

A. What I would have told them is, if that situation arises, you stop and ask for some guidance, and then we can deal with it at that time. And my suggestion to the trial judge is that he should be instructed that the counsel should stay away from those types of questions because the answer will be something that is not particularly favourable, and I guess you disclose it to the court at that time, what it is, if that arises. But the situation I have is that if you're asked about it, I don't know how defence counsel who's not aware of it is going to ask about an offer that he doesn't know about.

He later testified:

Q. You said that you felt that if you thought they were about to say something like that, then you would stand up and interrupt the proceedings, ask for the jury to go out, and advise the defence of the problem that they were getting into, so that it wouldn't happen. Don't you remember saying that?

A. I don't remember saying that, but there's some — that's along the lines of what I think that I would do.

Q. All right, but that wouldn't work too well, would it, sir, because the cat would have been out of the bag, as indeed it was out of the bag with Mr. Smith's re-examination?

A. The idea was to, if that were to happen, the idea would be to get it before it is out of the bag.

Q. But how do you catch it before it gets out of the bag. There's any number of questions that could elicit the answer —

A. I thought it was caught fairly well —

Q. [D]idn't have to be here if I didn't want to?

A. I thought it was caught fairly well on Mr. X.

Q. Well, that's because the cat was already out of the bag, sir, through Mr. May. So that's hardly surprising. It wasn't caught very well with respect to Mr. May, was it?

A. The point I'm trying to make, Mr. Lockyer, is that when Mr. X appeared that he was going to refer to this offer, he was cut off, and he did not have the opportunity to continue with what he was saying at that time. And that's what I'm anticipating might happen in another situation. It's not inevitable that the — well, maybe the paw would be out of the bag, but not the whole cat.

Q. Well, he was cut off by, if you recall, by Mr. Pinkofsky over Susan MacLean's objection; right?

A. That's correct.

Q. Yes. So it didn't quite work out the way you had visualized it, that the Crown's cutting him off. It was rather the defence cut him off over the objections of the Crown; right?

A. Well — I mean, the ability to cut him off can be employed equally by the Crowns as well as the defence. The fact the defence did it means the Crowns could have done it.

As indicated earlier, in preparing Mr. X to testify, Ms. MacLean did not discourage him from raising the offer at trial if the issue came up. *Ms. MacLean testified that telling Mr. X not to mention the offer would be tantamount to telling him to lie.*

Disclosure of the Offer

Initial Disclosure

The Crown attorneys did not disclose any information about the offer to the defence until after Mr. May mentioned it at trial. An issue before the Commission was why they did not, and whether this was circumstantial evidence that the prosecution had set a trap for the defence. The trial judge ruled at trial that the Crown had not been obliged to disclose the offer.

Mr. McGuigan testified that the defence had not been entitled to disclosure because the Crown had never intended to use the offer at trial. It was a matter that was meant to remain between the informants, the Crown and the police. He stated that he had never intended to disclose the offer, and only did so after it came out at trial because he felt that once it had become evidence it should be disclosed.

Mr. Smith testified in a manner similar to Mr. McGuigan, stating that the offer was never disclosed because the Crown had not intended to lead it as evidence at trial. He acknowledged that after the offer became evidence he still resisted disclosure of its details.

Ms. MacLean acknowledged that it was anticipated long before Mr.

May's re-examination that the offers could come out in evidence. This is because it was discussed that the informants had the right to mention that they were testifying voluntarily.

Ms. MacLean testified that the offer was not disclosed because it did not seem like evidence, but rather as a part of trial preparation, akin to advising a witness to tell the truth. She stated that she now feels that the offer should have been disclosed because it had the effect of enhancing the informants' credibility and because it was used by the Crown in the closing address. She added, however, that her change of view might be a result of the changes since the second trial in the law governing disclosure.

Incomplete Disclosure

After Mr. May mentioned the offer in re-examination, Ms. MacLean advised the defence that a similar offer had been made to Mr. X. The Crown also had Detective Fitzpatrick prepare a will-say about his involvement in the offer. Signed statements given by the informants about the offers, however, were never disclosed. An issue before the Commission was why they were not (and whether they ever existed).

As indicated above, Detective Fitzpatrick was asked to convey the news of the offer to the informants. He testified that he telephoned the informants in early February, 1992 and discussed the offer with them. The informants both rejected it. Detective Fitzpatrick then arranged to meet the informants at the Ajax police station the next day to discuss the matter further. At that time, he took signed handwritten statements from both informants documenting both the offer and their rejection of it. Mr. May confirmed that he met Fitzpatrick at the police precinct to discuss the offer. Mr. X gave no evidence in this regard.

The Crown attorneys testified that they did not know the statements existed. Detective Fitzpatrick said that he told the prosecutors that he had met with the informants and taken statements from them. He did not think he ever showed the statements to the Crown attorneys. He did not refer to the statements (or his meeting at the police station with the informants) in his will-say. He did not recall reminding Crown counsel of the statements when he was asked to prepare the will-say. When asked why he prepared a will-say when he knew the statements existed, he responded that he prepared the will-

say because he was asked to do so. Mr. McGuigan testified that he instructed Detective Fitzpatrick to prepare a will-say of his discussions with the informants and what he did in relation to the offer. Ms. MacLean testified that she would have expected Fitzpatrick to have produced the statements to the Crown once the offer became a disclosure issue.

Detective Fitzpatrick acknowledged that there was no reference to the statements in either his notes or a supplementary report, even though it would have been normal to include a reference in such a report. He testified that when he returned to London with the statements, he placed them in a file so that the police record-keeper would put the information into the computer system and store the statements in the appropriate file. Detective Chapman was responsible for the police files at the second trial. He testified that he could not locate the statements in the file indices, even though they should have been listed under the name of every person mentioned in each statement. He never saw the statements from the informants, but he did not see every report, and three different police cadets were responsible for filing during the trial. Detective Chapman said that he could have erred in creating the indices and could have lost some reports. He also acknowledged that he had never gone through the indices and compared them with the documents that were actually present in the files. Nor, to his knowledge, had anyone else. Detective Chapman did not look for the statements until several years after the trial. By that time, the files had been transferred to three different locations.

Detective Chapman was also asked why he did not remind the Crown attorneys to mention that he had been present when the offer was discussed with Mr. May, or volunteer to prepare a statement regarding the offer. He responded that he did not think he was involved, he thought the defence would assume he had been present, and Crown counsel knew he had been there.

C. Findings

On the evidence presented before me, I cannot say one way or the other whether John Scott had any involvement in the offers made to May and X. On the other hand, I am satisfied on the evidence that Leo McGuigan was involved in a direct way in the discussions concerning the offers and in the

decision that they be made. Alex Smith and Susan MacLean were also involved in some of the discussions and, to some extent, in making this important decision. However, I find that Mr. McGuigan, the senior counsel conducting the prosecution, was primarily responsible for conceiving the plan to tender the offers to the informants and for implementing it. The other two Crown attorneys deferred to him in the light of his standing and experience.

Numerous reputable witnesses were called on behalf of Mr. McGuigan to attest to the excellent reputation he enjoys in the legal community for honesty and integrity. He has been a role model for Crown attorneys in Ontario. The evidence also discloses that Mr. McGuigan was an experienced prosecutor who had been involved in many serious trials during his long and distinguished career. He was regarded by other Crown attorneys as somewhat of an 'icon'; he had also involved himself for years in the education of other prosecutors. I accept that evidence; it is impressive and it is relevant to my assessment of the credibility of the evidence given by Mr. McGuigan. It is also relevant to support his position that he is a person who is unlikely to engage in misconduct.

Nevertheless — and I say this with a great deal of regret — I must reject Mr. McGuigan's evidence that the offer was made to Mr. X on compassionate or humanitarian grounds. Similarly, I reject his evidence that the offer was extended to Mr. May so that he would not complain that he was being treated worse than Mr. X. I reject Mr. McGuigan's evidence that knowledge of the offers was to be confined to Crown attorneys, the investigators and the informants, and that it was not intended to be revealed to the jury. Mr. McGuigan's evidence that the offers were genuine is neither logical nor credible. In finding that the offers were extended for tactical reasons, I have taken into consideration the totality of the evidence presented to me, including, but not limited to, the extensive evidence summarized in this section of the Report.

According to Mr. McGuigan, the first discussion among the three Crown attorneys concerning the offers was shortly before Christmas 1991. He believed that he initiated the idea. To use his own phrase, he got 'caught in the Christmas spirit' and suggested that X be given the option not to testify. He testified that the sole motivation for the offer was humanitarian. The three Crown attorneys decided to think it over during the holiday. It was suggested that if they made the offer to X, they also had to make it to May,

and Mr. McGuigan agreed. The matter arose again in late January, 1992, and it was decided to proceed with the idea. The offers were not to be revealed to the defence or to the Court.

In his opening address on November 12, 1991, Mr. McGuigan told the jury that both informants would be called as witnesses to Morin's confession. He described the informants and their anticipated evidence, including the words purportedly uttered by Guy Paul Morin. It is clear from the opening that this evidence was treated as important evidence in the prosecution.

At the Inquiry, Mr. McGuigan conceded that, if the informants accepted the offer and were not called as witnesses, it could have resulted in a mistrial. I agree, because the jury would have learned about the existence of the alleged confession from the Crown's opening address and the defence could have — and likely would have — argued that mention of a confession in the opening would taint the jury's deliberations. Mr. McGuigan swore that if he had thought about a mistrial, the offers would not have been made. He said that his opening address was not in his mind when he authorized the offers. However, as the trial transcript discloses, he referred to this very portion of his opening address as late as January 20, 1992. Indeed, he submitted to the trial judge that Mr. Pinkofsky should not be permitted to defer cross-examination of Detective Fitzpatrick on issues relating to the informants until after the informants testified. Had his position prevailed, the jury would have heard more evidence about the jailhouse informants at that early stage in the proceedings. Mr. McGuigan's submission to the trial judge is inconsistent with any expectation that the informants might not be testifying. It is also inconsistent with his testimony before me that the opening address was not in his mind just prior to the Christmas adjournment or in late January, when he said the decision to tender the offers was finalized. It is also inconsistent with his wide trial experience in serious criminal cases.

Mr. McGuigan conceded that on his interpretation of the offers, it was possible that only one of the informants might accept it. That would have caused serious problems for the prosecution, particularly if the one who accepted the offer was Mr. May, because it was alleged that Mr. Morin had confessed to May and that Mr. X had simply overheard the confession from the next cell. Mr. McGuigan testified that the prosecutors never discussed this

possibility and how to deal with it, should it arise. Again, having regard to Mr. McGuigan's experience in criminal trials, it is inconceivable that he would not have foreseen this possibility. The evidence is overwhelming that the offers were not meant by Mr. McGuigan to give the informants a real option not to testify.

Mr. McGuigan agreed that if the informants had accepted the offers, it would have deprived the Crown of significant evidence at the trial. Indeed, this was the only direct evidence of Mr. Morin's guilt. The case was not an overwhelming one. Mr. McGuigan conceded that, from his point of view, this might have resulted in a guilty person being acquitted of the first degree murder of a young child. Mr. McGuigan claimed that he never thought of that. There was a real possibility that the Jessop family would be outraged if they felt that their daughter's killer went free because the prosecutors had tendered such an offer out of compassion and it was accepted. Mr. McGuigan also agreed that the prosecution might be subject to public criticism if a murderer who had purportedly confessed was freed because the prosecutors gave the informants the choice not to testify. Mr. McGuigan said that he never considered any of these consequences. He did not discuss them with his fellow prosecutors. In the light of the serious consequences that might have affected the prosecution if the offers were accepted, I find that the offers were not intended to be unconditional and genuine as Mr. McGuigan claimed they were.

Because Mr. X had been subjected to vilification and abuse as a result of his appearance at the first trial, and also because his psychiatric history would be publicly explored by the defence, Mr. Justice Donnelly, on the application of the prosecution, imposed a ban on the publication of his name or any evidence that would tend to identify him. The Crown submitted that the ban on publication was of vital importance to the administration of justice given that X was "a very important witness on a very serious crime of the murder and sexual assault of a nine-year-old girl." That ban is still in effect. No ban was made in relation to the identification of Mr. May, and there was little evidence that May had suffered greatly as the result of his exposure at the first trial. Apart from those considerations, May and X, in my respectful view, were not persons likely to evoke the degree of compassion put forward by Mr. McGuigan at this Inquiry. Their history of anti-social conduct and their complete disrespect for the rights of others in the community are reflected in their criminal records. Revealing aspects of their character were

known to Mr. McGuigan through the release of their records. They had bargained shamelessly with the police for their information about Mr. Morin. May and X represented the kinds of people who Mr. McGuigan had prosecuted for many years. Neither of them, I suggest, evoked compassion in Mr. McGuigan to the degree that he would make them the offers and incur the risks that I have outlined. Indeed, it is uncontested that neither of these witnesses had even asked the prosecutors to excuse them from testifying.

Mr. McGuigan was asked about the possibility that the informants might be challenged by the defence on the basis that they had been subpoenaed to the second trial and, therefore, had no choice but to testify; if they changed their evidence from that which they gave at the first trial, they could be charged with perjury. Apparently, Mr. McGuigan contemplated that very eventuality. Indeed, I find that Mr. McGuigan regarded this line of attack as inevitable. There was no doubt that the defence was compelled to suggest that the informants continued to be motivated in this way by their own self-interest. If such witnesses declined an offer permitting them not to testify, and the jury learned that, it would seriously undermine such a line of attack and enhance the witnesses' credibility. I reject Mr. McGuigan's evidence that it never occurred to him that declining the offers could enhance the witnesses' credibility until the offers came out in evidence. He contemplated that the offers, if revealed, would counter the thrust of such a cross-examination.

Mr. McGuigan testified that the offer was not to come out in evidence at the trial. He suggested at one point that the witnesses would have been told not to mention the offer. He then swore that he would have told the informants, had they raised the issue with him, that if they were cross-examined along lines that would invite comment on the offer, they should stop and ask for the Court's guidance. In that case, Mr. McGuigan implied, he would have asked the Court to deal with it. He would have suggested to the Court that counsel be advised to stay away from questions of this type because the answer might be unfavourable. This evidence is completely untenable. If the offer was truly genuine and reference to it could be responsive to a line of attack, why would the prosecutors tell the witnesses not to mention it. Indeed, Ms. MacLean's evidence, which is inconsistent with Mr. McGuigan's, is that it was contemplated that the offer might come out in testimony and that the witnesses had the right to say they were there voluntarily. Ms. MacLean so advised Mr. X when he raised the matter with

her in trial preparation. (She correctly noted that telling Mr. X not to mention the offer would be tantamount to telling him to lie.) I accept her evidence that it was contemplated that the offer might come out at trial and that the witnesses had the right to say they were there voluntarily.

I also find Mr. McGuigan's evidence untenable in light of what occurred at the second trial when the existence of the offer was revealed by Mr. May in re-examination. When May swore during his re-examination that he was testifying voluntarily, the defence objected to the admissibility of that evidence. Mr. Smith and Ms. MacLean, in Mr. McGuigan's presence, argued that the evidence was relevant and admissible and Mr. Justice Donnelly ruled in their favour. Having regard to that ruling, it could be expected that similar evidence might be forthcoming from X, who gave evidence immediately following May, and who did, in fact, disclose the offer to the jury during his cross-examination. Mr. McGuigan agreed that the evidence that both informants apparently rejected the offer did enhance their credibility.

I find that the offers were made for tactical reasons with the hope or expectation that their rejection would be revealed to the jury, and in the knowledge that, if revealed, it would enhance the credibility of the informants. It had been suggested to May and X in cross-examination at the first trial that self-interest was the only motivation for their testimony. Mr. McGuigan conceded that he expected that they would be cross-examined in a similar manner at the second trial. I find that it was contemplated by him that the offers, if revealed, would counter the thrust of such a cross-examination.

It is significant that Mr. McGuigan argued in his closing address to the jury that both informants testified voluntarily and that the jury should consider that when assessing their credibility. I find that, contrary to the position that he took at the Inquiry, Mr. McGuigan hoped that the rejection of the offers would be disclosed to the jury and he expected to take advantage of it for the benefit of the prosecution. In my view, that evidence, and its use by Mr. McGuigan in his closing address, may have influenced the jury to convict Mr. Morin.

Alex Smith is an Assistant Crown Attorney who was called to the Bar of Ontario in 1983. He had worked for Mr. McGuigan for three years before practicing in a number of other jurisdictions in this province. Mr. McGuigan

was senior to him in both years and experience at the Bar. Witnesses, both orally and by letter, vouched for his excellent reputation for honesty and integrity among the people who work in the Crown attorney system. For example, James Treleaven testified that Mr. Smith enjoys an excellent reputation for integrity. A number of judges before whom he had appeared share that view.

I accept that evidence and I have outlined earlier how such evidence is relevant. It is important evidence and I have taken it into account in making my findings. Mr. Smith testified that he was present at a meeting of the Crown attorneys involved in the Morin prosecution before Christmas, 1991 and after Mr. McGuigan had delivered his opening address to the jury. At that meeting, Mr. McGuigan came up with the idea of the offer to be made to the informants. He testified that it was born of the hardship that X had suffered as the result of the first trial; it was made for humanitarian and compassionate reasons. Once the offer was made to X it would be difficult not to make it to May. He conceded that the decision to make the offer was an important one.

He swore that he did not consider the possibility of a mistrial if the offers were accepted, nor did he consider the other implications of the making of the offer which I have alluded to in my findings concerning Mr. McGuigan. His position was that the offer was genuine. It was not a trial balloon.

In the light of the strong evidence of Mr. Smith's good character, and having regard to his junior position in relation to Mr. McGuigan, and keeping in mind the factors that the law requires me to consider before I should make a finding that may reflect adversely on his reputation, the evidence does not satisfy me that Mr. Smith was aware that the offers were not genuine and that they were not made on compassionate or humanitarian grounds. Given Mr. McGuigan's stature and seniority, Mr. Smith may have accepted — uncritically — Mr. McGuigan's representation, blinded to the difficulties inherent in that position.

I have greater difficulty, however, with the question of whether or not Mr. Smith intended to adduce from May that he was giving his evidence voluntarily. Mr. Smith testified that that was not his intention. Yet the notes he made in preparation for his examination of this witness (Exhibits 196A and 196B) indicate that, in re-examination, he would ask May "Why are you

here?" At first blush, it would seem that this question was designed to elicit an answer which would indicate that May was there voluntarily. If so, Mr. Smith's own notes would contradict his testimony.

Commission counsel questioned Mr. Smith on this point:

Q. [T]he last question that's reflected there is, "Why are you here?" And I think in fairness, I have to put to you a suggestion, which is, is it possible that that question was intended to elicit the fact that Mr. May was there voluntarily, and that you didn't have to ask the question, because he answered about the voluntary nature of his attendance in response to the previous question?

A. No, that's not the intention at all.

Q. All right.

A. If I can explain?

Q. Sure.

A. First of all, it's not clear to me that that is a question I had determined to ask. It's got a question mark, and I can't claim a recollection as to why the question mark's there, but there's no question marks with respect to the other questions on that page. Secondly, I don't think a responsive answer to that question would be: I'm here voluntarily. My appreciation of an answer that Mr. May would give to that sort of question was that he felt a moral obligation to come, and we had dealt with that issue earlier in the re-examination.

It is debatable what the 'proper' (or likely) answer to the question would have been. But, as Mr. Smith suggests, an answer by Mr. May along the line that "he felt a moral obligation to come" cannot be ruled out. Such an answer, too, would have countered in some measure the suggestion which the defence was bound to make that May and X were there to further their own cause and that they could not, therefore, be believed.

Given that possible interpretation (and there may even be others), I

cannot find to the requisite degree of satisfaction that Mr. Smith intended to bring out the offer even though, as I said before, I am satisfied that that was Mr. McGuigan's hope and expectation — a hope and expectation which he may not, however, have shared with his colleagues.

Susan MacLean was called to the Bar of Ontario in 1982. She has been an Assistant Crown Attorney in Durham Region ever since. Letters were filed on her behalf that firmly established her fine professional reputation for fairness and integrity. I accept that evidence. Her first experience in a murder case was when she assisted John Scott to prosecute Mr. Morin at his first trial. Scott made all the tactical decisions at that trial. She was assigned by Mr. Scott to assist him in the prosecution of the second trial. However, when it was decided that Mr. Scott should remove himself from the case because he might be called as a witness, it was felt that senior counsel should conduct the prosecution, and that is when Mr. McGuigan was assigned to the case, to be assisted by Alex Smith. Because she was familiar with the evidence and could, therefore, provide continuity, Ms. MacLean was instructed to assist them.

Mr. McGuigan, who was called to the Bar in 1962, had skillfully conducted the prosecution of many murder cases prior to 1990. I am satisfied that he made the major tactical decisions in the second trial of Mr. Morin, and Ms. MacLean deferred to his greater seniority and experience.

She testified that at the meeting of the prosecutors at which the offer was raised (she said there was only one such meeting and it was in December, 1991), it was discussed that if the offers were rejected, the informants should have the right to say they were testifying voluntarily. The decision to tender the offers was made at that meeting and, according to Ms. MacLean, the Crown attorneys failed to consider the implications of the offer. She was concerned that X might accept the offer, but hoped that moral considerations would impel both informants to do the 'right thing.'

She spoke to X about the offer in mid-January, 1992 and he indicated to her that Fitzpatrick had already spoken to him. She formally put the offer to X on January 13, 1992. When she made the offer, she was not too concerned that he would accept it; Fitzpatrick had told her that X had rejected it. When she was preparing X to give his evidence, she told him that she was not going to lead evidence of the offer from him. However, when he raised

the issue of the offer, she instructed him that he could mention the offer if he wanted to; there was no reason to hide it. She felt that telling X not to mention the offer would be tantamount to telling him to lie. She said that the offer was not disclosed to the defence because it did not seem like evidence; it was trial preparation, akin to telling a witness to tell the truth. She now feels that the offer should have been disclosed.

I find that it was unlikely that Susan MacLean knew that the offers were not prompted by compassion or that they were not meant to be genuine. On all the evidence, I am not convinced that Mr. McGuigan confided in her fully as to the real nature and implications of the offers. When he said that he was imbued with the Christmas spirit, she may have accepted the truth of that statement because of her respect for him and his stature.

Detective Fitzpatrick was an experienced officer with the Durham Regional Police. He is now retired and lives in Newfoundland. However, he conscientiously attended the Inquiry and offered his testimony voluntarily. He was one of the two police officers in charge of the investigation of the murder of Christine Jessop. He has a good reputation among his former superior officers as a conscientious and professional police officer.

However, after considering his testimony, as well as that of the other witnesses who testified about the offers, the evidence satisfies me that Detective Fitzpatrick knew that the offers were not made as the result of compassion for X and a consequent need to treat May in the same manner as X.

I find that from the outset it was not intended by Mr. McGuigan that the offers be firm and unconditional. He sent Detective Fitzpatrick to find out the reaction of May and X to the possibility that the Crown might make the offers that they need not testify at the trial. I find that if it appeared likely that the two informants (or either of them) would accept the offers, Mr. McGuigan would have ensured that the offers were not pursued. I find that Fitzpatrick was aware that the offers were not genuine, although he testified that he did not put the offers to the informants as a 'ploy.'

At the Inquiry, Detective Fitzpatrick said that when he contacted May and X he advised them along the lines that the Crown might make them an offer and that they should think about it, so that when they were interviewed

by the prosecutors they would have an answer. Apparently, the informants gleaned the real message because both of them purported to reject the offers, although one would have thought that they would receive the news with sighs of relief at the opportunity not to be exposed to intensive cross-examination. When both informants apparently told him that they would reject the offers, Fitzpatrick reported this to the prosecutors.

Mr. McGuigan was asked why, if he knew from Fitzpatrick that May had already rejected the offer, he put the offer to May again. He responded that he did so in order to avoid any misunderstanding, and because he felt the informants might put more faith in an offer given to them by the Crown attorneys personally. In all the circumstances, I reject that evidence. It is illogical and not credible. It is evidence that supports the conclusion that the offers were not meant to be firm and unconditional.

Detective Fitzpatrick testified that when he had made the offers to May and X at the police station in Ajax he took signed statements from them confirming that they were declining the offers. It is curious that Detective Fitzpatrick, who purportedly was told only to advise the informants about an offer that might come from the prosecutors, spoke to May and X about the offers by telephone, brought them into the Ajax station to discuss the offers again, got an answer to offers which had not yet been made, and recorded in writing the informants' rejection of the offers. He said these statements were signed by the informants.

Detective Fitzpatrick testified that the signed statements were then taken to London and placed in a police file. Sergeant Chapman acknowledged that such a file was kept in the police office in that city and that he was in charge of it. However, he has never seen those statements. The statements were apparently not found and were not produced at the Inquiry. When I consider all the evidence, I am unable to make a finding as to whether Detective Fitzpatrick took written statements from May and X at the time he discussed the offers with them.

The issue arose at the Inquiry whether Detective Fitzpatrick told Janet and Ken Jessop that the offers were not genuine. I am not able to make a finding that he did, after considering Fitzpatrick's evidence and the evidence of Ken, Janet and Robert Jessop.

Inspector Shephard testified that he believed that the offer was made to enhance the informants' credibility. He was not even told about the offers until after they were made. The day after Inspector Shephard so testified, he resiled from his earlier position, indicating that it was unfair to those involved for him to speculate. He had spoken to Detective Fitzpatrick about the issue in the interval. I place no reliance upon this evidence. Mr. May also testified that he believes that the offer was made to him to enhance his credibility, though he did not know that at the time. I consistently place no reliance upon anything that he has said which is otherwise unsupported in the evidence.

I have found that the Crown attorneys who prosecuted at both trials and the police officers who were involved in those prosecutions believed that May and X were telling the truth about the alleged confession made by Mr. Morin. Mr. McGuigan testified at the Inquiry that he still believes that both informants were telling the truth and that Mr. Morin perjured himself when he denied that he made the confession.

Perhaps it was Mr. McGuigan's firm belief in the guilt of Mr. Morin and the horror of the crime that was committed on Christine Jessop that caused him to overstep the limits which, I feel, should bind prosecutors in the prosecution of their cases, when he involved himself in the offers made to May and X and used their rejection to bolster the prosecution's case.

D. Systemic Evidence and Recommendations

(i) Overview

I have found that Mr. May and Mr. X were wholly unreliable. Their evidence was motivated by self-interest. They were predisposed, by character and psychological make-up, to lie. Mr. May was diagnosed as a pathological liar and, on his own admission, he was a particularly facile liar. Since these witnesses were motivated by self-interest and unconstrained by morality, they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed to May was easy to make and virtually impossible to disprove. These facts, taken together, were a ready recipe for disaster.

The systemic evidence presented during Phase VI of the Inquiry

emanating from Canada, Great Britain, Australia and the United States demonstrated to me that these dangers were not unique to the in-custody informers presented in the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informers.

A number of systemic witnesses gave evidence relating to in-custody informers. I intend to summarize some of that evidence now. Other portions of that evidence are referred to in the context of my specific recommendations.

(ii) The Los Angeles Experience

In October 1988, Leslie White, a repeat jailhouse informant in Los Angeles, demonstrated for the Los Angeles County Sheriff's Department how he would impersonate public officials by telephone from inside the jail to secure information about a fellow inmate. This information would then be used to fabricate the fellow inmate's confession. Directives were issued by the Sheriff's Department and the District Attorney's Office designed to prevent unauthorized telephone access to information. Yet, notwithstanding these directives, in January, 1989, Mr. White conducted a similar demonstration in a hotel room for a television crew from the CBS program, *60 Minutes*. White was given the name of a defendant whose recent arrest for murder had been locally reported. Posing as a Deputy Sheriff, Deputy District Attorney, and a Los Angeles Police Department detective, White was able to obtain the cause of death, date of shooting, the age and race of the victim, and the existence of multiple gunshot wounds to the victim's thighs. He then demonstrated his ability to arrange for himself and the defendant to be transported together to court so that he could demonstrate that he and his target had spent some time together.

Leslie White's revelations (together with allegations of widespread misuse of jailhouse informants) caused the Los Angeles County Grand Jury to conduct an investigation into the involvement and use of jailhouse informants in the county's criminal justice system.

Douglas Dalton, a witness before me, was Special Counsel to that grand jury.

Mr. Dalton was admitted to the California State Bar in 1956. He has served as an Adjunct Professor of Law at Pepperdine University School of Law, a member of the Committee on California Jury Instructions (Criminal), the Special Committee on Revision of the Federal Criminal Code, and as author and editor of *West California Criminal Law*, West Publishing Company 1995. He is an elected fellow of the American College of Trial Lawyers. I found him to be an impressive witness.

One hundred and twenty witnesses testified before the grand jury. One hundred and forty-seven exhibits were filed. Hundreds of additional interviews were conducted by Mr. Dalton's investigators and staff. The investigation extended to jailors, prison officials, guards, probation officers, defence attorneys, the District Attorney's Office, the Attorney General's Office, the Los Angeles Police Department, the Los Angeles County Sheriff's Department, jailhouse informants themselves³⁶ and private citizens. The grand jury was empowered to subpoena individuals and secure documentation. This grand jury investigation appears to represent the most comprehensive inquiry into this topic ever conducted.

The 153-page report of the grand jury (*Report of the 1989-90 Los Angeles County Grand Jury Investigation of the Involvement of Jailhouse Informants in the Criminal Justice System in Los Angeles County*, June 16, 1990) was drafted by Mr. Dalton and his staff, based upon input from the grand jury during its deliberations. The report was then accepted and confirmed by the jurors.

The Grand Jury Report contains many insightful findings and recommendations. I have cited some below. In doing so, I am mindful of the important distinctions between the Canadian and American justice systems and of the particular circumstances that produced this most extreme situation in Los Angeles.³⁷ Having said that, I share much of the perspective offered

³⁶ Six jailhouse informants testified; another 19 were interviewed.

³⁷ Mr. Frank Sundstedt, a senior prosecutor in the Los Angeles District Attorney's Office during the relevant time frame, noted that "many of the things that occurred in my office occurred as a direct result of the office being so large, and not knowing in many respects what the left hand was doing in relation to the right hand." Richard Wintory, the Chief Deputy Attorney General of Oklahoma, made a similar observation at the Inquiry.

by Australian Commissioner Ian Temby, Q.C., in his *Report on Investigation Into the Use of Informers (Volume 1)*, made pursuant to the *Independent Commission Against Corruption Act 1988*, where he states at page 37:

I visited California during the course of 1991, both in relation to this investigation and for other purposes. The procedures followed were then outlined to me by Harry Sondheim, a senior lawyer in the District Attorney's Office. I was very impressed by the work that had been done. I found it dispiriting, as I believe he did, that the authorities in other parts of the United States had not been to Los Angeles to see what could be learnt from their unfortunate experience. It seems that in most other jurisdictions the problem is being ignored.

That is simply unrealistic. What happened in Los Angeles could happen in other parts of the United States, and could happen in Australia. There is no reason to believe that the extreme situation that developed there has happened here, but in the absence of appropriate preventative steps it probably would.

.....

What happened in Los Angeles is important for New South Wales. Much can be learned from the Grand Jury Report. Indeed similar problems are likely to arise wherever informants are relied upon to give evidence for the prosecution in an adversarial system and there are not adequate controls in place.

The Los Angeles Grand Jury was assisted in its work by the L.A. County District Attorneys' Jailhouse Informant Litigation Team. Frank Sundstedt, another witness at this Inquiry, was a lead prosecutor for this team. He dealt with the various post-conviction discovery issues and writs of *habeas corpus* that resulted from the public allegations and the team's own work in cataloguing the use that had been made of jailhouse informant witnesses over the preceding 10 years.

Mr. Sundstedt has been a prosecutor for some 25 years. He is a Fellow of the American College of Trial Lawyers. He is now Head Deputy for the Los Angeles County District Attorneys' Office in Pomona, California.

In the entire county, there are over 1,000 prosecutors. About 70,000 felonies are prosecuted every year. Prior to his position in Pomona, he held various posts, including Assistant District Attorney (essentially the third in command within the Los Angeles office).

Mr. Sundstedt's objectivity was raised as an issue before me.³⁸ Mr. Sundstedt has never used a jailhouse informant himself as a prosecutor. Though the grand jury was extremely critical of the L.A. District Attorney's Office, Mr. Dalton noted that the criticism was not directed to Mr. Sundstedt personally. Indeed, his litigation team cooperated fully with the grand jury. I found both Mr. Dalton and Mr. Sundstedt's evidence to be extremely candid and helpful to me.

The L.A. grand jury examined the use of jailhouse informants from January, 1979 to the beginning of 1990. During roughly the same time period (the 10 years prior to October, 1988), Mr. Sundstedt's team identified 153 cases where jailhouse informants had testified for the prosecution, although I must note that members of the defence bar estimated that at least 250 cases were so affected.

The purpose of the grand jury investigation was not to judge individual cases, but to conduct an overall inquiry into how and why the system went wrong and to recommend policies and procedures that would prevent or curtail the emergence of such practices in the future.

'Jailhouse informant' was defined by the grand jury as a person other than a co-defendant, percipient witness, accomplice or co-conspirator, whose testimony is based upon statements made by the defendant where both the defendant and the informant are held within a correctional institution. This definition is similar to that used by me in this Report.

Prior to the publication of the grand jury's report, informers had been sequestered in the Los Angeles County Jail and wore a red wrist band

³⁸ I was asked by counsel for the Morins to exclude Mr. Sundstedt's testimony, due to his extensive involvement in determining when capital punishment will be sought against individual defendants. I refused this request, and said I would judge his credibility by the usual standards, including his demeanor while testifying. His involvement in the death penalty issue was part of his duties as the holder of his office.

identifying them as ‘K-9s,’ the designation for informers. As many as 80 to 90 informers were housed together at one time. This caused some to work in teams, each supplying some part of information against a defendant, and trading off information. As the report reflects, “there was a great deal of intercourse among them in providing information that they felt would be beneficial to them.” The informants welcomed a high profile defendant amongst them so that they would be given an opportunity to say that they were with him when he confessed:

In highly publicized cases, informants declared that “if we get this case, we’ll all go home” — according to one informant. That informant explained how informants will work as follows: One informant acquires some information on the case. He may then relay that information to another informant who disseminates it to other informants. Each informant will then try the story out on police, changing a word here and there for slight variation. When an inmate previously unknown to other informants arrives in the informants’ area in the jail, the informants will discuss “booking” him (i.e. providing fabricated evidence about him to the authorities) all day.

In summary, not only were jailhouse informants drawn to highly publicized cases, they were ‘mutually reinforcing.’ ‘Mutually reinforcing’ informants in a ‘high profile’ case could certainly describe Mr. May and Mr. X.

All jailhouse informants are either charged with, or have been convicted of, a crime. The grand jury report reflects that these crimes include the most serious and often heinous offences. One jailhouse informant had been determined to be a mentally disordered sex offender. Mr. Dalton reflected that this certainly raised concerns with the grand jury “that a person who had been so classified would be used as a prosecution witness.” A number of the informants were sociopaths. One had been described by a psychiatrist as a ‘pathological liar.’ He had falsely confessed to a crime that he himself had not committed. According to the informant, the prosecution had used his testimony in five or six subsequent cases. Mr. Dalton noted that the grand jury was concerned that a diagnosed pathological liar would be used in presenting the government’s case; however, he pointed out that the prosecutors did not necessarily know that he had been so characterized when

he testified.³⁹ Of course, Guy Paul Morin's prosecutors at the second trial knew that Mr. X was a mentally disordered sex offender and that Mr. May had been diagnosed as a sociopath and pathological liar.

The grand jury found that the informant system did not appear to provide any disincentive to re-offending. There was a high rate of recidivism amongst the jailhouse informants. One informant was convicted of two counts of arson in 1975, of attempted rape in 1979, of rape in 1981 or 1982. He was re-arrested in 1985 and thereafter convicted of multiple serious offences. Recidivists were used as informants in multiple cases. Of course, Mr. May re-offended after the second trial and sought assistance from the prosecutors. Similarly, Mr. X re-offended between the first and second trials and after the second trial, and sought assistance for these offences (not always with success).

Mr. Dalton saw a broad range of benefits, real or perceived, that motivated informants. These benefits would run from special privileges — better food, excusing prison violations — to early release from incarceration. There could be a benefit to a family member or friend, the payment of money, extra food, letters to the Bureau of Prisons on their behalf, or special consideration on sentencing. The reward did not have to be great. As Mr. Dalton noted:

One prison official told me that in his view some of them would lie for an extra banana at a meal. The incentives and the rewards did not have to be great in all cases.

Put succinctly, the grand jury was not confident that even a relatively small benefit provided some assurance of trustworthiness on the part of these informants.

The grand jury found that the courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such testimony. One appellate court had reflected that "whatever consideration a jailhouse informant may expect for testifying, the

³⁹ Indeed, this psychiatric report was discovered by Mr. Sundstedt.

direct compelling motive to lie is absent.”⁴⁰ Mr. Dalton noted that this was not borne out by the evidence before the grand jury. Jailhouse informants have a very strong incentive and motive to lie. Indeed, Mr. Dalton recalled no cases in which jailhouse informants sought no benefits for their co-operation.

Despite their benefit-oriented motivation, the informants did not always present themselves that way. The report states:

Jailhouse informants want some benefit in return for providing testimony. The more sophisticated may attribute their willingness to testify for law enforcement to other motives, such as their repugnance towards the particular crime charged, a family member having been a victim of a similar occurrence, the lack of remorse shown by the defendant or other explanation to account for their assistance to law enforcement.

Nevertheless, in the vast majority of cases, it is a benefit, real or perceived, for the informant or some third party that motivates the cooperation.

Both Mr. May and Mr. X claimed that they were motivated to testify by their repugnance towards the crime with which Mr. Morin was charged. As noted earlier, I do not accept this testimony. Their presentation is reminiscent of the Los Angeles experience. Their attitude demonstrates that an informant's motive to lie may not be obvious — indeed, it may often be less conspicuous than that of a defendant.

The grand jury noted instances where prosecutors submitted to the jury that there would be no benefits and, almost immediately after the case concluded, benefits were extended. Two examples follow:

Case No. 1:

A 17-year-old boy was charged with murder and attempted murder. An informant testified that he had obtained a confession on an in-custody bus trip. He testified to the confession and the he was shocked at the

⁴⁰ *People v. Alcala*, 36 Cal. 3d 604 at 624 (Cal.1984).

defendant's lack of remorse. He further testified that he had asked for nothing and that the District Attorney would not even discuss favorable treatment with him.

Within a day of this testimony he provided the Deputy District Attorney with a sample form for a letter he wished written to the Department of Corrections requesting an early release. The jury was never apprised of this request but was advised that benefits are not awarded for testimony.

Following the conviction, a letter was written to the Department of Corrections requesting an immediate release.

.....

Case No. 5:

Prior to his testimony regarding an alleged jail house confession, the informant insisted that he did not want anything in return for his testimony, that he just did not like rapists because his sister had been raped. Following his testimony, he requested that the Department of Corrections be advised of his role when he became a candidate for an early release program. A letter was written by the Deputy District Attorney requesting "favorable consideration" to his request for an early release.

The grand jury report also reflects the extent and persistence of the informants' motivation:

Each informant who participated in the investigation after the appointment of Special Counsel in December 1989, was told at the onset that Special Counsel had no authority to secure special favours or treatment in exchange for the informant's cooperation. Following their testimony a number of the informants phoned the office of Special Counsel, requesting further contacts. These requests were not pursued by Special Counsel staff.

In other words, despite being clearly told that the grand jury would confer no benefits upon them, some of the informants who appeared before

the grand jury tested the waters and contacted Mr. Dalton's staff in the hope that they would get some sort of special consideration for providing testimony.

Informants would also time their requests for benefits to maximize their usefulness to the prosecution. The grand jury report states as follows:

From the [various cases that are cited], one could conclude that the more clever informant, realizing that his successful performance will be enhanced if it appears that he is not to benefit therefrom, will testify that he has not been promised anything and will then wait until after his testimony to make his request for favours, oftentimes successfully.

Another area of unspecified benefits may occur when an informant is seeking to build up a reserve of credit to be used as future needs may require.

Prosecutors also sometimes deferred the determination of specific benefits until the informants had completed their testimony.

For example, where informants face the imposition of sentence, American prosecutors frequently ask the Court to defer their sentencing until after their testimony is given. The prosecutors contend that this approach provides informants with an incentive to testify truthfully, since the extent of their cooperation and truthfulness will be considered by the prosecution and by the judge in imposing the sentence.⁴¹ The grand jury recognized the difficulties inherent in this approach. Jurors are denied information to assist them in assessing credibility; in fact, they may be unable to properly evaluate what influence the benefits or expected benefits may have on the testimony. Equally problematic, deferral of sentencing (and the precise benefit to be conferred) may provide informants with an incentive to give the most 'helpful' (as opposed to the most truthful) testimony, to enhance their position.

Mr. Dalton described the dilemma in another way:

⁴¹ Indeed, Richard Wintory emphasized that this was the appropriate way to proceed for prosecutors.

[T]he theory of [putting sentencing over until after the informant's testimony] for the prosecutor was: Well, we can't rely on him delivering, and so we're going to have to use his testimony first to see how this works out before we confer any benefit. And of course, the counterpart to that is: Well, if you don't trust him, why should a jury trust him? So we viewed that as a serious problem.⁴²

In the Morin prosecution, the prosecutors relied, in part, upon their instructions to Mr. May and Mr. X to only tell the truth. The grand jury spoke to the efficacy of that practice, however well-intentioned:

When the cooperating informant is told that it will be reported in his favour if he gives "truthful" testimony, it is only reasonable that "truthful" to the informant means consistent with the prosecution's theory of the case. Otherwise, of course, there is no point in calling the informant as a witness. Such an incentive to provide testimony may have a significant influence on the integrity of the fact-finding process.

Mr. Dalton reflected that an instruction to the informant to only tell the truth was ineffective or meaningless to the more serious offenders. This may be no different than deferring sentencing to ensure that the informant tells 'the truth.' The truth, to an unscrupulous witness, may only be that which is consistent with the prosecution's theory of the case.

Mr. Dalton noted that "the concept of truth really had no meaning to some of these people, certainly for a large part sociopaths, and they would by their own admission lie one way, then recant their testimony, tell something different, and so the moral concept of right and wrong and truth and false, and so forth, really had no serious meaning to them at all." Mr. May's numerous recantations similarly demonstrated his indifference to the truth.

The grand jury found an appalling number of instances of perjury and false statements attributed to jailhouse informants. Indeed, my summary of the report's contents fails to adequately convey the extent to which "the

⁴² The California Supreme Court also recognized these potential problems: *People v. Phillips*, 41 Cal. 3d 29, 47 (1985); *People v. Morris*, 46 Cal. 3d 1 (1988).

inmates were running the asylum," to quote Mr. Sundstedt.

Informants told the grand jury that they had repeatedly perjured themselves and provided false information to law enforcement agencies.

One informant claimed that he had testified for the prosecution in Los Angeles County 10 times and provided information to law enforcement agencies over 100 times and this despite documentary evidence that he had previously failed a polygraph test, then made allegations of subornation of perjury by law enforcement officials, and then changed these allegations prior to another scheduled polygraph examination. The report notes:

The Department of Corrections also notified the Attorney General's office that this informant was "a real flake." This individual's career as an informant was just beginning to blossom.

Los Angeles defence attorneys provided examples of informant impropriety. One informant was rebuked by the prosecutor when he offered himself as a prosecution witness. He then offered to testify for the defence. Another testified for the prosecution at the preliminary hearing. When the prosecutor refused to agree to his release from custody, he wrote to the prosecutor indicating that "the more he thought about it, the more he believed his conversation with the defendant never took place."

The report describes the practices employed by jailhouse informants to secure evidence. Leslie White's approach represented the most flagrant method. Informants reported that they would gather information from newspaper articles which they would save. Sometimes they would have a friend or relative attend court to enable them to provide authentic-sounding information. Informants would exchange information about specific cases with other inmates. Informants would read the materials which the defendant retained in his or her cell, to prepare for trial. Indeed, California defence attorneys expressed reluctance to provide these materials to their clients in custody for this reason. This would, in turn, heighten the clients' mistrust of their own attorneys.⁴³

⁴³ In a joint panel of senior defence counsel and prosecutors presented by the Ontario Crown Attorneys' Association and the Criminal Lawyers' Association, similar

The report also reflects that informants procured information on a crime from the defendant himself and then distorted that information to fabricate a confession. In one case, the defendant described a crime he witnessed. The informant used that description to claim that the defendant confessed. In another case, an informant enticed the defendant into writing the allegations down, which he then allegedly modified so it would be treated as a confession.

The report sums up as follows:

[I]nformants profess, and indeed have demonstrated, the astonishing ability to discover information about crime in order to concoct a confession by another inmate. Their incarceration does not prevent them from accessing information on other defendant's cases. Indeed, their familiarity with the criminal justice system permits them to fully exploit information held by its various components.

There was so much proven access by informants to information, that corroboration of an informant (for the purposes of the L.A. District Attorney's policy manual) must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement officials or to the perpetrator.

The grand jury considered the extent to which the authorities were responsible for this epidemic of false claims by jailhouse informants. Two main findings were made:

Finding No. 1

The Los Angeles County Sheriff's Department failed to establish adequate procedures to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions

concerns were expressed by Bruce Durno and Lee Baig, senior defence counsel in Ontario. Mr. Baig noted that, in his Northern Ontario jurisdiction, a protocol has developed, permitting an accused in custody to have the Crown brief locked in a briefcase only accessible to the accused while he or she reviewed the brief in jail. Steve Sherrieff, a senior Crown counsel, thought this to be a very desirable practice.

would be made.

The Los Angeles County Sheriff's Department is responsible for maintaining order in the Los Angeles County jail system. It is also responsible for the transportation of inmates throughout Los Angeles County to various court appearances. Liaison officers from the Sheriff's Office recommend inmate classifications, which affect placement of inmates within the institution.

As a general rule, inmates charged in notorious cases are classified as K-10s. This designation is reserved for inmates who are to be kept away from all other inmates, including other K-10s, 'as much as practical.' Informants, as it said before, are classified as K-9s.

The grand jury found that the classification of some inmates as informants occurred under questionable circumstances. In one case, a defendant in a highly publicized murder case was arrested and housed in the jail's general population. A few months later he was released. Five years later, he was rearrested on the same charges. A police detective requested that he be classified as an informant, allegedly because years earlier he had testified in a receiving stolen property case and had given information about auto thefts. One jail liaison deputy approved the request. A second liaison officer questioned the classification, believing that "placing the defendant in with informants would be like throwing a 'lamb into the lion's den' because the informants would say he had confessed to them." The officer reluctantly went along when a recent magazine article reported that the defendant had been granted immunity for testimony six years earlier. There was no evidence that the defendant felt he was in danger. He was transferred to one floor of the institution. An informant on another floor (the 14th) contacted a jail deputy, suggesting that the informant was in danger and should be transferred to his floor. The deputy recognized that something was wrong, so he reclassified the defendant and removed him from the informant floors. The police detective received a telephone call from the informant on the 14th floor, inquiring as to the whereabouts of the defendant. He requested that the defendant be placed in his cell. The detective denied that his original request for the defendant's classification as an informant had been motivated by a desire to place him near the 14th floor informant.

In another case, a detective and a deputy district attorney discussed

the idea of placing a defendant charged with murder in the 'informant tank' in the hope that one or more of the informants would 'come up with information' to strengthen the prosecution's case. The prosecutor thought this was a good idea and secured the approval of her supervisor. In his testimony before the grand jury, the detective admitted that he falsely advised jail personnel in writing that the inmate was an informant because he wanted the inmate placed with informants. Within 24 hours, one informant contacted the detective with 'information.' Three informants came forward within several days. Their evidence was ultimately excluded by the Court due to constitutional violations. The case was then dismissed for lack of evidence.

The corollary also took place. Notorious informants (ordinarily K-9s) were often reclassified as K-10s and housed with other K-10s. The grand jury heard evidence which indicated that the Sheriff's Department deputies intentionally reclassified such inmates for the purpose of gathering information.

Some informants were so notorious that defendants, who would find themselves even momentarily in a holding cell with them, were reported to say "Get me out of here, get me away from him," knowing that even slight exposure would make the defendant vulnerable to a falsely claimed confession. A defendant who had always denied any criminal involvement would purportedly confess in 20 minutes to a total stranger in a holding tank. An inmate was powerless to prevent a notorious informant from sharing a bus or a holding cell. On the other hand, the informants perceived that, when a notorious defendant was placed with them, the system was tacitly encouraging them to tell the authorities something that would help convict that defendant.

Interestingly, the grand jury report reflects that informant 'perception' of how the system works may be as important as reality:

Whether or not true, many informants believe that law enforcement officials have directly or indirectly solicited them to actively conduct themselves to secure incriminating statements from other defendants. Some informants claim that various law enforcement officials supply informants with information about crimes, in order that they (the informants) may fabricate a defendant's confession.

In exchange for providing evidence for the prosecution, the informants expect significant benefits from the government. Based on this expectation, informants supply information favourable to the prosecution, often irrespective of its truth.

Informants' claims concerning the pervasiveness of perjury and falsifications reflects a belief, at least among some informants, that this is how informants ply their trade. The belief that this is how the informant game is played can only encourage other informants to follow suit.

Finding No. 2

The Los Angeles County District Attorneys' Office failed to fulfill (sic.) the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony.

The informants made disturbing allegations about how they were pressured by law enforcement officials to become informants and to fabricate confessions. They reported widespread abuses by sheriff liaison officers. They also alleged that law enforcement officials, including deputy district attorneys, supplied them with arrest reports, case files, photographs of victims or verbally provided information necessary to falsify a defendant's confession. They also alleged less blatant efforts to feed them information:

Sometimes law enforcement are less blatant when feeding informants facts about a case. An example of an indirect method of furnishing information arises after an informant denies hearing incriminating evidence. The official then responds, "Don't you remember about...", supplying critical facts about the particular case. The informant can then piece together enough details of the crime to fabricate a confession.

Mr. Dalton testified that the evidence adduced before the grand jury was that the authorities, either police or prosecutors, did provide information to the informants directly and indirectly. However, the grand jury made no findings of fact in reliance only upon the informants who testified before

them. Either they lied to the grand jury about prosecutorial practices (which confirms they are perjurers) or, if they were telling the truth (about prosecutorial practices), it was very bad news.

The grand jury did find instances where the relationship between the deputy district attorney and the informant was just too close — there were a lot of improper accommodations made by deputy district attorneys on behalf of informants.

Some informants were able to achieve an elevated status because of their activities; others were permitted an unusual degree of contact with prosecutors. I note two such examples cited by the grand jury:

Example No. 1:

One top administrator in the District Attorney's Office recalled for the Grand Jury an incident in 1986. The administrator received a call "out of the blue" from a jail house informant claiming to be unable to reach a certain Deputy District Attorney. The informant stated that he was seeking a favor from that Deputy District Attorney, and asked the administrator to help him instead. The informant identified himself as "a snitch over here in the county jail" with "the assertiveness that one might do when presenting credentials that you were a member of the F.B.I."

Example No. 3:

Testimonial and documentary evidence also revealed that another high-level management official with the District Attorney's Office complied with an informant's request for letters written to the Board of Prison Terms. An informant drafted a letter to the Board of Prison Terms for signature by a high-level management official setting forth the informant's alleged cooperation in nine cases in Los Angeles County. The informant sent the draft of the letter to a Deputy District Attorney. This deputy revised the letter eliminating reference to one case, and forwarded the revised copy of the letter on to the management official. The management official testified that he believed another official verified the contents of the

letter. Included in the list of cases in which the informant cooperated was a case in which the judge declined to rely on the informant's testimony, questioning his credibility.

As well, the report reflects the absence of any real assessment of the informants' credibility:

Very little effort was expended by the District Attorney's Office to investigate the background and motivation of most jailhouse informants in order to assess their credibility prior to presenting them in court as witnesses. Numerous accounts were given by Deputy District Attorneys that the only investigation of this nature consisted of asking other Deputy District Attorneys how the informant performed in other cases.

The evidence disclosed that no research was done on these individuals, no information kept, no index indicating how many times they had testified before, or offered information before, or what kinds of benefits they had asked for or received. Instances were noted where informants were found by judges not to be credible witnesses. Although these opinions were expressed from the bench, no record of them generally was maintained, nor was the information generally disseminated throughout the District Attorney's office. Similarly, multiple informants would come forward in a notorious case. Only some, if any, were used. No record was kept of those rejected and the reasons for that rejection.

The grand jury felt that the prosecutors failed in their ethical responsibility to see that the evidence had some sort of authenticity, rather than just determining whether the informant would be effective in persuading a jury.

The grand jury also found a lack of proper controls and supervision concerning benefits, that is, individual prosecutors could do pretty much what they wanted to do. As well, there was inadequate disclosure of the benefits or expected benefits.

Representations made on behalf of an informant were often overly generous in describing what the informant had done, his great value and the danger to himself.

The report also commented on the failure to prosecute informants shown to have lied:

The willingness to fabricate information and evidence has undoubtedly been encouraged by the lack of prosecutions for such conduct. The investigation failed to identify a single case of prosecution of an informant for perjury or for providing false information, despite the fact that numerous cases of this nature were discovered during this inquiry.

Cases have been described where an informant has testified to two sets of diametrically opposite facts in the same trial and also wherein testimony is given which is completely contrary to earlier taped statements. Cases have been identified where judges, after hearing testimony of informants, have stated their disbelief.

Still other cases establish informants have testified in one fashion and then later said they lied or testified under oath in other proceedings that they had lied.

Mr. Dalton did note that two informants (one of whom was Leslie White) were prosecuted for perjury after the grand jury investigation.

Before the use of jailhouse informants became a matter of public controversy, some prosecutors within the District Attorney's Office were bothered by the practices, reported them to their superiors, raised complaints and protests, and put forward suggestions such as the central index. Indeed, Mr. Sundstedt was one of those who expressed such concerns. Nothing was done about the problem. Yet there was significant evidence of individual prosecutors who used jailhouse informants despite specific warnings brought to their attention about the demonstrated unreliability of those informants.

Frank Sundstedt, testifying at the Inquiry, almost entirely adopted the findings of the grand jury. As pointed out before, its report describes a time when the "inmates were running the asylum." He explained that this occurred, in part, because the L.A. District Attorney's Office, perhaps the world's largest, failed to adequately supervise what was transpiring. Many deputy district attorneys were naive. Though he did not believe that the prosecutors deliberately processed perjured witnesses, the prosecutorial conduct, at times,

amounted to malfeasance and was, in his view, in many respects outrageous.

Defence attorneys also raised another issue with the grand jury — the systemic problems in investigating an alleged jailhouse confession. If the claim only came to the attention of the defence some time after the confession was made, it was difficult to determine not only who was sharing the cell at the relevant time, but which other inmates might have been around to say it did not happen.

The grand jury made these recommendations:

The District Attorney's Office

1. The District Attorney's Office should maintain a central file which contains all relevant information regarding the informant. As a minimum, the file should include information regarding the number of times the informant has testified or offered information in the past and all benefits which have been obtained.
2. A complete record should be maintained describing all favorable actions taken on behalf of an informant, including copies of all relevant letters written. This information should be contained in a central index.
3. No consideration should be provided to an informant beyond that set forth in the written statement required by Penal Code Section 1127a, except as may be authorized by leave of court.⁴⁴
4. The District Attorney should give increased consideration to the prosecution of charges of perjury and other crimes related to the conduct of jailhouse informants.
5. The District Attorney should conduct regular training of its professional staff regarding the specific ethical

⁴⁴ Prosecutors are now required by legislation to file a written statement with the trial court setting out the benefits conferred.

responsibilities of prosecutors.

The Sheriff's Department

1. The Sheriff's Department should more clearly define the criteria which determines K-9 or informant classification for jail personnel.
2. A law enforcement officer requesting an inmate to be classified as an informant should be required to provide information as to the reasons for the requested classification. The reasons stated and the identity of the requesting officer should be recorded.
3. When an informant advises jail personnel of a claim to have heard an incriminating statement by a fellow inmate, the jail deputy should record the location of the involved persons at the time of the alleged occurrence.
4. The Sheriff's Department should place greater adherence to its policy to keep inmates who are classified as K-9s away from inmates who are classified as K-10s.
5. Due consideration should be given to determine if there is a practical means by which an inmate's legal papers can remain exclusively within his control.

Mr. Dalton's examination in chief by Commission counsel concluded as follows:

Q. Mr. Dalton, finally, and I say finally because I'm aware that some of the other counsel here are going to be putting specific potential recommendations to you for your comment, so I won't do that at this stage. But if there's a message or a conclusion of particular importance that you'd like to convey arising out of your involvement in these grand jury proceedings, what would the conclusions or message be?

A. Well, firstly, I'd say that whenever the prosecution decides to use criminals as witnesses, they introduce

some very, very serious problems into the justice system. The greatest, of course, is that it can result in the conviction of the innocent. The other lessons learned from it, I believe, and these again limited to Los Angeles and what we saw, but that these informants typically are very manipulative, they're very skillful, they're very devious.

The moral constraints of right and wrong and truth and falsity really have no importance to them at all, and in fact, with these kinds of informants, and the ones that we heard from, and the investigation uncovered (sic) on our part that there is indeed — I would say, really, you'd start with having heard all this, that there's a presumption of — that the testimony is really not worthy of belief. Knowing all the facts that we know, having to do with the informants that we dealt with, and the evidence related to them, that they are just, in my opinion, not worthy of belief, and certainly shouldn't be the basis upon which any serious decision is made.

In response to the public allegations arising out of the misuse of jailhouse informants in Los Angeles, the District Attorney's Office issued a number of special directives. These were introduced into evidence by the Ontario Crown Attorneys' Association through Mr. Sundstedt.

Special Directive 88-11, dated November 1, 1988, directed the compilation of cases in which jailhouse informants had testified and all cases in which Leslie White had testified, regardless of the subject matter. Shortly thereafter, Special Directive 88-12, dated November 4, 1988, reflected the office's interim policy as a result of the disclosures. This policy required that approval be obtained from a Bureau Director before any jailhouse informant could be called as a prosecution witness. The following was also stated:

No deputy has ever supposed that [jailhouse] testimony springs from the prisoner's sense of good citizenship or moral duty. On the contrary, the prosecutor is by virtue of training and experience altogether conscious of the self-interest of the informant and actively mindful of the source — his background and his character. Further, since we are unalterably committed to obtaining the truth and seeking justice, the informant's information is viewed through the prism of our ethical mandate.

That view remains; it should not be changed — and, indeed, it has only been reinforced and justified by recently reported events.

Special Directive 88-14, dated November 17, 1988, added the following instructions:

No one should underestimate what is at stake. Justice depends not only on the substance of a criminal case, but upon the process by which the case is proved. The capacity for criminals to systematically obtain information from throughout the system of justice strikes at public confidence in the system and poses the serious risk of an injustice being done. We must eliminate from the People's case the risk of perjured testimony by a jail house informant. That threat is most acute when the indication of the informant's reliability is solely that "he relates facts which are known to law enforcement, but could not otherwise be known by him". That factor of reliability has been shown not to be dependable in all cases.

For that reason, this office will no longer call a witness a jailhouse informant to testify to a defendant's oral statement, admission or confession without concrete evidence of the truthfulness of the informant (for example, a recording in the defendant's own voice, a document in the defendant's own handwriting, etc.). Even then, prior approval by the appropriate Bureau Director must be obtained.

Special Directive 90-02 (revised), dated February 28, 1990, provided as follows,

On January 1, 1990, sections 1127a, 1191.25 and 4000.1 dealing with in-custody informants were added to the Penal Code. These new sections should be reviewed and kept in mind whenever you are dealing with an in-custody informant.

The new law essentially attaches certain conditions to the calling of a witness who is an "in-custody informant". Namely, whenever an in-custody informant, who is not a co-defendant, accomplice, co-conspirator, or percipient witness, testifies in a criminal

trial to statements which the defendant made to him while both were in custody.:

1. The defendant is entitled to a cautionary instruction concerning the informant's credibility. (Penal Code section 1127a(b).)
2. Contemporaneous with the calling of that witness, the prosecution shall file with the court a statement of any consideration promised to or received by the informant witness. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to the rules of evidence. (Penal Code section 1127a(c).)
3. Prior to the informant testifying, the prosecution must make a good faith effort to notify the victim of any crime committed by the informant witness of any consideration given on the victim's case in exchange for the witness's testimony. This victim, however, has no right to intervene in the case in which the informant is testifying. (Penal Code section 1191.5)

Special Directive 93-04, dated May 4, 1993, then provided this:

Since 1988, when Special Directive 88-14 was issued, this office has strictly controlled the use of jailhouse informants as witnesses. This administration intends to continue the practice of rigidly controlling the use of jailhouse informants.

Legal Policies Manual Section V.L. dealing with the use of jailhouse informants has been reviewed and has been revised to remove any perceived requirement that corroborative evidence in the defendant's voice or handwriting must be available in every case in which a jailhouse informant is used. Instead, strong corroborative evidence is required before an informant may be used. This corroborating evidence must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement. The revised version of Legal Policies manual Section V.L. is attached and should replace existing page V.L.

The revised version of the policy manual reads:

L. Jailhouse Informants

A "jailhouse informant" is someone in custody who receives a communication from another in-custody person about a crime committed by the person.

No "jailhouse informant" shall be called to testify to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the truthfulness of the informant.

A Deputy wishing to use a "jailhouse informant" as a witness must obtain the prior approval of the Jailhouse Informant Committee. The Committee is comprised of the Chief Assistant District Attorney, the Assistant District Attorneys, and the Bureau Directors. Written requests to use a "jailhouse informant" must be submitted to the office of the Chief Assistant District Attorney through the appropriate Head Deputy and Bureau Director. The request must include: a brief description of the crime; the name and criminal history of the informant; the evidence being offered by the "jailhouse informant"; a description of the corroborating evidence; and an analysis of the strengths and weaknesses of the case if the "jailhouse informant" is not used. In addition, if any benefit has been promised to the informant by any member of law enforcement or by any employee of the District Attorney's Office for information offered on the pending case, that fact must be included in the memorandum. Furthermore, the trial deputy must contact the Habeas Corpus Litigation Team and inquire whether the informant has offered to be a witness in the past or has testified in any prior case. The result of this inquiry must also be included in the memorandum.

If the Committee approves the use of a "jailhouse informant", the trial deputy must comply with the requirements of Penal Code Sections 1127a, 1191.25 and 4001.1.

If the informant testifies, the trial deputy must notify

the Habeas Corpus Litigation Team.⁴⁵

Mr. Sundstedt advised the Commission that the Jailhouse Informant Committee is staffed by the Chief Deputy, the various Assistant District Attorneys and Criminal Directors. It often questions the trial deputy who proposes to call the evidence. The Head Deputy and the Bureau Director have to approve the request first. Jailhouse informant evidence has been approved about 14 times from 1994 to 1997. No requests were made in 1993. Sometimes approval was given, but with the advice that the evidence ought not to be called since the case was otherwise sufficient.

There is now a central index. It is contained in the appellate department of the district attorney's office. It is frequently reviewed and examined by defence attorneys, who have free access to it.

The thrust of Mr. Sundstedt's testimony was that the Los Angeles District Attorney's Office has adopted, through its policies and practices, a 'guarded gate keeper' approach to jailhouse informants. Prosecutors are encouraged not to rely upon such informants. Their use is highly regulated within the District Attorney's Office. The policies appear to reinforce the need to objectively assess both their reliability and their true utility in a criminal prosecution. As I understand it, this involves a changed culture where the primary goal is not to find ways to make these witnesses appear more presentable.

Many of the recommendations which I make were specifically addressed by Mr. Sundstedt. Indeed, he reflected that he had learned certain things from this Inquiry, which he intended to address with his office. I will make further reference to his testimony in the context of specific recommendations.

I have dealt with the Los Angeles County Grand Jury Report in great detail. I did so because it appears to be the most thorough study of jailhouse informants available and there is much which we can learn from the Los

⁴⁵ Mr. Sundstedt indicated that the *habeas corpus* litigation team replaced the jailhouse informant litigation team after the completion of the grand jury investigation. It is staffed by appellate assistant deputy district attorneys.

Angeles experience. I do not suggest that the situation which now exists in Ontario approaches either the scope or the gravity of what occurred in Los Angeles County. But what happened there can happen here too. We have no reason to suspect that criminals in Canada are less cunning or less sophisticated than criminals in California, so we must learn from the Los Angeles experience and benefit from their deliberations.

(iii) Crown Policy Guidelines

I have already referred to the new Crown policies introduced during this Inquiry. One relates to in-custody informers. (See *Crown policy — In-Custody Informers, dated November 13, 1997, Appendix L*) As I earlier reflected, I was advised that this and all other Crown policies will be reviewed in light of my final recommendations.

I found this Crown policy extremely helpful in facilitating discussion at this Inquiry. One of my counsel, Mr. Sandler, filed a document containing possible changes to the Crown policy arising out of the evidence here. (See *Exhibit 298, Appendix M*). He raised these with the Ministry of the Attorney General panelists during the systemic phases. I am suggesting significant changes to this policy. Nonetheless, I wish to acknowledge that the present policy represents a laudable first step in addressing these difficult policy issues. Peter Griffiths, one of the architects of the present policy, was an impressive witness. He considered with openness the suggested revisions put to him, adopted a number of them and reflected his concerns about others. I have considered his and other evidence carefully in crafting the recommendations which follow.

(iv) Survey of Ontario Crown Attorneys

A survey conducted of 255 Ontario Crown attorneys was filed at the Inquiry. Thirty-three percent (84) of the Crown attorneys surveyed have prosecuted cases (totaling 133) involving a jailhouse informant. These Crown attorneys tended to represent the more seasoned prosecutors. Over 60 percent of these cases involved murder or related offences. Twenty percent of the cases involved offences inside the jail. (This and other responses led me to conclude that the respondents included as 'jailhouse informants' persons who would not qualify as 'in-custody informers' as defined later in this Report: for example, the witness to an offence allegedly committed in jail.) The

respondents stated that the vast majority of informants were not promised a present or future benefit. In most of those cases, the Crown attorneys had no knowledge of the informant later receiving a benefit. In 38 cases, Crown counsel elected not to call such a witness, 42 percent of the time due to lack of credibility. The vast majority of the Crown attorneys were unaware of any case where an informant had given testimony, later shown to be perjurious. Further responses on this topic are noted under specific recommendations below.

Sarah Welch⁴⁶ drew upon the Crown survey in her remarks. She reflected that she would not want to see more supervision infused into the jailhouse informant decision-making process. Crown counsel must be independent to exercise prosecutorial discretion.⁴⁷ The decision whether to tender a jailhouse informant is but one of the very important discretionary decisions made by an individual Crown attorney. Further, the Crown survey suggests that Ontario prosecutors are alive to the dangers of such evidence and rarely utilize it. She did note that “that’s not to say there isn’t room always for more training, and ... the Morin Inquiry ... [has] been a useful exercise in highlighting the potential dangers here.”

(v) Martin Weinberg

Martin Weinberg was tendered as a witness by the Criminal Lawyers’ Association. He is a distinguished defence attorney, a partner in a Boston law firm, who received his Bachelor of Laws degree from Harvard Law School in 1971. He has practiced criminal law for approximately 25 years, pleading cases before various United States District Courts, Courts of Appeal and before the United States Supreme Court. He is a director of the National Association of Criminal Defence Lawyers, the pre-eminent organization of criminal defence counsel in the United States. He has extensively lectured attorneys on confronting jailhouse informants and lectured judges and policy

⁴⁶ As noted in Chapter II, Ms. Welch is President of the Ontario Crown Attorneys’ Association and a seasoned prosecutor.

⁴⁷ In crafting my recommendations throughout this Report, I was mindful of the importance of preserving prosecutorial discretion, and of not unnecessarily binding Crown discretion in the conduct of a case: see *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* at 40-41.

makers on the correlation between minimum mandatory sentencing and the motivation to commit perjury.

Most recently, Mr. Weinberg appeared as counsel in two Florida federal trials — in one, 27 or 28 prosecution witnesses were called, almost all of whom were jailhouse witnesses who had bargained for and expected substantial benefits for testifying. All accused were acquitted. In the second, about 12 jailhouse witnesses formed part of the prosecution's case. The accused were acquitted on one of the most serious charges; the jury was undecided on the balance of charges. In that case, one of the witnesses was captured on tape telling a cousin, in effect: This is my golden opportunity, let's not screw it up. I can be home in a year. The cousin testified, initially denying that she knew that the inmate hoped for any sentence reduction.

U.S. federal laws provide for minimum mandatory sentences in certain cases, particularly for drug offences. This, taken together with abolition of parole and requirements that a prisoner serve 85 percent of his or her sentence, means that many federal defendants face lengthy jail sentences. Rule 35 of the Federal Rules of Criminal Procedure provides that the Court, on motion of the government, may, within one year after imposition of sentence, reduce the sentence to reflect the defendant's substantial assistance in the investigation or prosecution of another person. Absent that motion (known as a 5K motion), courts are almost powerless to change a sentence. Written plea agreements specifically refer to this prosecutorial discretion. Prosecution witnesses, facing many years in jail, testify, knowing that the prosecutors' evaluation of their testimony will affect whether such a motion is filed. Mr. Weinberg concluded on this point:

So this combination of heavy sentences, no parole, 85 per cent time, and only one ticket to freedom which essentially was within the complete control of the prosecutor, creates an historic imbalance in our justice system. Before 1987, this imbalance didn't exist. I consider it to promote unreliable testimony, not through the fault of our fine jurists who are required to implement this system; they have no discretion under minimum mandatory sentencing. They doubt they do have some discretion under guidelines, but not a tremendous amount.

It's not the fault largely of United States prosecutors.

Most of them are resourceful, they're hard working, they believe in their tasks. But they have no crystal ball, they have no CAT scans, they have no x-rays into what motivates these very desperate defendant/informants who are there doing twenty and thirty years in jail and faced with a cruel choice, which is: Do they sit silently with their freedom expiring, with their families often thousands of miles away since many of them are arrested here but come from other countries? Or do they actively seek the benefits of this 5K system?

And it's simply a system that, in answer to your original question, I don't think should be duplicated in any respect, by the Canadian justice system.

I am mindful of the distinction to be drawn between the Canadian experience and that of Mr. Weinberg, given the system described above. I agree with Mr. Weinberg that it is a system not worthy of emulation in Canada. It provides an almost irresistible incentive to implicate a fellow inmate.

Nevertheless, Mr. Weinberg was a valuable witness, whose objectivity was commended by counsel for prosecutors and defence counsel alike. His evidence dovetailed in most respects with Mr. Sundstedt. His recommendations were as follows:

1. Informants need a meaningful disincentive to perjury. Courts should be encouraged upon their perception of untruthful testimony to initiate investigation by an independent prosecutor, required to report back as to the results of that investigation. Further, even if an informant's false claim is ultimately not acted upon at trial, it ought to be addressed in a serious way. In the United States, it is a felony to make false statements to a federal law enforcement agent. (Of course, public mischief is one of a number of Canadian crimes which can address non-testimonial false information.)
2. The commission of further offences by the informant ought to bring a serious systemic reaction — serious consideration should be given to a blanket rule that any informant who commits a crime while an informant, or who gives any false

testimony, should have his capacity to continue to get benefits extinguished by the prosecutor.

3. Benefits should be determined before testimony, made express to the informant, disclosed to the defence and finite — that is, they should not be enhanced after testimony, absent exigent circumstances (reviewable by a judicial officer). The prosecutor must be free to revoke these benefits if the witness is untruthful.
4. The prosecutor has the duty not to enhance the credibility of an informant through his or her own credibility (otherwise known as ‘vouching’). Vouching occurs when a prosecutor communicates to a jury through questioning or in summation that he or she has some extra-judicial source of knowledge as to whether the informant is truthful or not, or when a prosecutor communicates to a jury that he or she is monitoring or supervising the informant’s testimony, and benefits are only conferred upon his or her evaluation that the witness is truthful. There should be strong judicial sanctions against vouching. Any vouching should be accompanied by the strongest possible instruction by the court to a jury that it is improper and unethical for a prosecutor to vouch, implicitly or explicitly, for the credibility or trustworthiness of his or her witness. This is particularly important as jury questionnaires have demonstrated that prosecutors are perceived as more trustworthy than defence counsel.
5. Before and after receipt of the jailhouse testimony, the court should effectively focus the jury on the fact that this category of evidence has historically generated on occasion unreliable results and that they have a duty as triers of fact, on their oath as jurors, to bring special scrutiny, special care and caution to the testimony they are about to receive.
6. Pre-trial disclosure should be made of the identity of informants, the promises, the entire universe of criminal background known to the prosecutor, including knowledge of crimes committed or suspected to have been committed by

the informant which are still potentially prosecutable (since these crimes relate to their testimonial motivation) or criminal conduct known to the prosecution which can be used to impeach.

7. A registry would be a meaningful vehicle for defence counsel to receive information regarding prior instances where an informant testified or provided information.
8. A court should be empowered to exclude unreliable jailhouse informant evidence, where on the preponderance of evidence, the testimony is untruthful. This is a more meaningful protection than a corroboration requirement, since informants are motivated to recruit untruthful corroboration.
9. The authorities should not be permitted to place informants in a position (*i.e.* in the accused's prison cell) where they can receive confessions.

(vi) Richard Wintory

Richard Wintory was tendered by the Ontario Crown Attorneys' Association as a witness on systemic issues. He provided an articulate and colourful perspective that was quite different from Mr. Sundstedt's. (Indeed, I commend the O.C.C.A. for providing me with a diversity of prosecutorial views, all well-considered and expressed.)

Mr. Wintory has been a prosecutor since 1984, serving in various capacities, including Chief Deputy Attorney General for Oklahoma. He is most recently the Senior Assistant District Attorney in Oklahoma City, performing both policy and trial functions and reporting directly to the District Attorney. He has extensively lectured on a variety of criminal law issues, particularly for the National College of District Attorneys. He has trained prosecutors and law enforcement officers on the use of informants in criminal investigations and prosecutions. He noted that this topic includes "how to work informants instead of having them work you, which has been legitimately identified ... by this Commission as an issue worth concern."

Mr. Wintory was a forceful advocate of the adversarial system as the

best means to ascertain the truth or falsity of jailhouse informant testimony. His recurrent theme was that false, inaccurate or misleading evidence does not cause miscarriages of justice — such evidence often exists. Rather, miscarriages of justice result from the failure of the adversarial system — whether due to inadequate representation, incomplete disclosure by prosecutors, inadequate resources for either side or the failure of the court to do its job. Highly skilled adversaries, with adequate resources and appropriate disclosure, best ensure that ‘right’ prevails. It follows that, in his view, the preconditions set in Los Angeles, and, indeed, even the present Ministry of the Attorney General policy guidelines in Ontario, are misdirected. In his view, the Los Angeles approach has chilled the use of jailhouse informants, even when there are factors of reliability that indicate that the evidence is true and important. The Ministry guidelines go in the wrong direction; they do not serve the interest of letting right prevail as tested by the adversarial system. Reliability *voir dire*s are inappropriate. Credibility is for the jury.

Having said that, Mr. Wintory was strongly of the view that prosecutors must carefully assess, in determining whether to tender the evidence, the reliability of a jailhouse informant, the existence of confirmatory evidence, the extent to which certain inducements make the informant incredible, and the desirability of conferring benefits upon jailhouse informants, even if regarded to be truthful. He also indicated that the prevailing view among American prosecutors is that evidence should not be tendered by a prosecutor unless he or she subjectively believes it to be true.

(vi) Steven Sheriff

Steven Sheriff has been a prosecutor for some 26 years, with the federal Department of Justice, as senior disciplinary counsel for the Law Society of Upper Canada and now as an Assistant Crown Attorney in Brampton. He has lectured extensively on a number of subjects, including jailhouse informants, to law enforcement agencies, which consult him on a regular basis regarding serious and complex investigations across Canada. During the joint panel of prosecutors and defence counsel presented by their respective associations, Mr. Sheriff provided a helpful analysis of the issue, and it is worth quoting at length:

Mr. Commissioner, all of us experienced in criminal law — we have lots of it in this room this morning — on both sides of the fence, we all know that there is no category or species of witness that has any monopoly on the truth or on fiction, for that matter, and that perjurers can be found across the entire spectrum. Perjury has its genesis in human nature. Every human being's capable of telling the truth, but it would be an impossibility to categorize a group of people and say that: We're not going to have them in criminal cases because they're incapable of telling the truth.

That would be a serious mistake, banning these types of witnesses. There is no historical precedent for that, although it's been debated in the cases. For example, paid informants, the question of whether or not they can be called has been litigated in the Ontario Court of Appeal. No category or species of witness that I'm aware of is precluded from entering a criminal case, and it would be very wrong to do so. To ban them outright, I suggest, harms society, and could lead in inappropriate cases, to wrongful acquittals. Now wrongful convictions are anathema to all of us, and wrongful acquittals in serious cases are very harmful as well.

There are many homicide cases, for example, that a wrongful acquittal would not necessarily impact society in the future, but when we're talking about serial predators and other types of very dangerous offenders, a wrongful acquittal means that innocent future victims can be maimed or killed, and it's therefore wrongful acquittals are a serious concern to society, as well. I mean, none of us in this room want wrongful convictions, and society, and those of us in this room, we don't really want to see wrongful acquittals, either.

And therefore, in my suggestion to you, and I guess I've had a little more experience than most in this field, because I consult with the police across the country on these issues frequently, we have to try and tailor-make a recipe to get the truth. It wouldn't be right to ban them, because jailhouse informants come in all different shapes and varieties. You might have somebody who's only serving intermittent sentences, a husband who has assaulted his wife. He isn't a career

criminal. He's already been sentenced, he's got nothing to gain.

So to just have that outright ban that they can't even hit the witness box, I would suggest would not make any sense. People talk in prisons. They've got lots of time on their hands, obviously. They have a commonality of interest when they go in there. They're after all facing criminal charges, and truth can emerge from those quarters. On occasions, jailhouse informants can assist the defence. More frequently, probably in practice, they're called by the Crown, but to say that we're going to have a moratorium on them is to have a moratorium on truth, which is unfortunate.

Now I would like to amplify some of the guidelines that we already have in this province, and when I say that I've encountered truthful jailhouse informants, you have every right to ask me: Well, how do you know that? And in my way of thinking, it is vital to focus on the integrity of the information that they're providing, very vital to have a flow chart, if you will, on that, because obviously, if it can be shown that they're relating information known only to the perpetrator, or they give you information leading to the discovery of real evidence, then we start to have a strong reason to have confidence in the integrity of the information.

So I focus on the sources of potential contamination, and there are lots of them. And it's my thesis to you that training and cautious use of jailhouse informants, coupled with police protocols, will have a real effect on integrity assurance, and that's what we're after. We're after the truth. And therefore, to properly consider using jailhouse informants, you need, first of all, a full media search. And that is, the print media, radio, and television, anything that's ever come into the media, because obviously, we're looking at contamination here.

And they should be approached from the base point, could there be contamination. For example, in homicide cases, it's common these days, as you know, that there'll be Crime stoppers re-enactments, and obviously, if there's been a Crime stoppers re-enactment, and the informant has been exposed to it,

then we have real contamination. You've got to be careful about this, because the informant could have acquired the knowledge through visitors at the jail. The information could have been in contact with other inmates who've seen these things, and this could have happened before or after the informant has entered custody.

So it is very important for justice that there be a full and comprehensive media scrutiny. Second thing that is important to me, and I would trust to all of us, would be to be very careful about the continuity of the Crown brief. Clearly, if the Crown brief has been into the institution, then one has to be very worried indeed that the jailhouse informant has acquired knowledge from borrowing the Crown brief or viewing it that way. And prudent defence counsel and Crown attorneys — of course, the Crown won't have any real control of this — but prudent defence counsel will ensure that they do not give the Crown brief to the custodial client, or indeed, perhaps, to the non-custodial client, if others are in custody, so that we don't have that kind of contamination.

And indeed, we probably need more safeguards in that regard, because a Crown brief in an institution is a very dangerous document. It is important in assessing the integrity of the information as to how detailed it is. If the jailhouse informant simply states that the inmate told them he did it, it is obviously much more risky than information that he did it with a nine-millimetre Smith and Wesson nickel plate. So it is not just the information, it is its detail, and whether there's a contaminating source that is very, very vital indeed.

Now the next item I have on my own checklist is the integrity of the informant. Let's face it, by definition, that's damaged, or they wouldn't generally be in jail in the first place, so that isn't the test. The test is basically, one, a continuity test. Has the informant been in custody with other accomplices who could have knowledge of the crime? Has the informant been exposed to friends of the accomplices? This could be a very complex elimination process involving an analysis as to what ranges the various participants have been on, and whether there was an opportunity to speak with

contaminated sources.

And that's not an easy investigation in itself, to look at continuity. It's also very important to look at the informant's past history, and a central registry that the Crown panelists, and no doubt, the defence panelists would all be in favour of a central registry. It would have to be protected identity-wise, because there can be reprisals, very violent ones, indeed, but a central registry that we, the Crown, could readily access, knowledge of any testimonial information given before, and that would be, of course, mandatory disclosure to the defence would be a good thing, because in the ones that I've found that were contaminated in the past, and obviously, I'm not infallible on this, but when I've detected contamination, it's come from, in part, at least, analysis of past history.

And the more you know about the informant's past performance, the better. A criminal record is not necessarily as important, although obviously, there are certain types of records that would cause one grave concern. But it's much more important to analyze the past history, and as I keep on coming back to the risk of contamination. It is important to analyze the benefits sought. Our survey shows that benefits are not given very often, but certainly they're often sought. And it's natural to expect that benefits will be sought; there no doubt are altruistic persons who may come forward, particularly in shocking crimes.

But it is not something that should alarm us, that people would want something in return, although one has to be scrupulous if there are any benefits given — first of all, benefits sought should be carefully recorded. Benefits given should be scrupulously documented, and obviously, I'm talking about full disclosure of all of these subjects. The benefits given, as a matter of policy, I suggest it would be wrong to give promises of future assistance for future crimes — that clearly would be against public policy — and the benefits, future and present, should be carefully documented.

There is one vexing dilemma, Mr. Commissioner, and that is this: That if a prior jailhouse informant is subsequently re-incarcerated, there still is a problem of

safety, should they be freshly jailed and new charges, and although, as I say, in my view, it would be wrong to promise future benefits, we have the dilemma of what do we do with their safety in the future? I would think our situation is vastly different from some of those in Los Angeles, which I've read the study there, because there is a serious disincentive to become a jailhouse informant in Canadian institutions because there is a real risk of a violent reprisal in some of these cases.

So that I don't get the impression that this is done lightly, and I'm scandalized by the thought in Los Angeles that it could be done for some flimsy reward. It hasn't been my experience in Canada. The benefits sought have been significant. Obviously, there should be thorough recording of the informant's approach to the authorities wherever possible, and a very clear record of all the discussions. That may not be possible at its inception, because it can take many, many different routes, from a phone call on down. But obviously, it's desirable to have a careful tracking mechanism.

Now these are just a few of my thoughts; I don't want to go on at great length. The point I want to make is that I do believe that this can be taught, that cautious discrimination can be practiced. I certainly plan on making a point of teaching the subject more thoroughly. This Commission has heightened my awareness, and no doubt it has for all of my colleagues. I believe that policing standards and protocols can be developed and should be developed, but that they should not be mandatory, because these are fluid and flexible, and unique situations.

And to say that because paragraph 4 on a protocol wasn't followed, that the informant shouldn't be called, is to pigeonhole what is really a very complex subject, so I would not be in favour of that. But on balance, my suggestion to you is that the ends of justice can be well served if prosecutors and defence are very, very cautious about this type of evidence. And I can tell you, any prosecutor worth his or her salt is already aware of the dangers.

The question is, education and training as to how to sift it out, how to sift the tainted from the real. And I do humbly suggest to you that throwing the baby out with the bath water is not the solution. The solution comes in rational and cautious approach to this type of evidence.

(vii) Sergeant Thomas Hart

Sergeant Hart has been a member of the Durham Regional Police Service since 1979. He has worked both in the Criminal Investigations Branch and in the Intelligence Branch, the latter since 1993. He prepared the informant registry policy (which postdates Durham's involvement with the two informants in the Guy Paul Morin case). It is contained in the D.R.P.S.'s Regulations and Procedures Manual. This policy is largely designed to protect the investigator or handler of an informant. (See *Informant Registry Policy, Appendix N*)

When an investigator recruits an informant, that investigator (or 'handler') does a background check on the informant and advises the officer in charge of the intelligence branch, who maintains a master index system or registry of all of Durham's informants. (This index or registry of confidential informants should not be confused with the suggested central registry of jailhouse informant witnesses elsewhere discussed.) A further background check is done by that officer, utilizing the Automated Criminal Intelligence Information System (ACIIS) and the Ontario Criminal Intelligence Information System (OCIIS). With the assistance of the handler, the officer in charge of the intelligence branch is to assess the credibility, value, motive for participation and acceptability of the informant. The handler is not to offer benefits or make promises to the informant; these are to be determined by the intelligence officer. This officer, however, cannot negotiate benefits sought in relation to the informant's criminal charges or sentencing; that must be referred to the Crown attorney. The assessment of the informant's reliability is recorded in the registry. The policy sets out the documentation required to reflect contact with the informant.

Sergeant Hart testified that this policy does not specifically address jailhouse informants. In his view, it is desirable, as a result of the evidence given at this Inquiry, that amendments should be made to the policy to specifically address the unique problems of unreliability which jailhouse

informants present, over and above those related to the general informant population.

Sergeant Hart would not oppose a central jailhouse informant registry in Ontario. He thought it important that benefits be established 'at the beginning' and that future consideration should not be left open. Finally, he agreed that it would be a good idea to audiotape and, where possible, videotape police contacts with the jailhouse informant.

(viii) Ontario Case Law

I was provided with several Ontario appellate decisions which are relevant to the systemic issues presented here. Two of these judgments are of particular relevance.

***R. v. Frumusa*⁴⁸**

The Ontario Court of Appeal considered Frumusa's appeal against conviction on two counts of first degree murder. The Court concluded that fresh evidence relating to the credibility of a crucial Crown witness, referred to as "C," had sufficient weight and probative value that a new trial was required. The facts, as outlined by the Court, are instructive.

In 1988, Richard and Annie Wilson were killed in their home, the result of blows to their heads. The killings had the appearance of an execution. There was no evidence of forced entry, robbery or vandalism. Frumusa lived with Brenda Smith, Annie Wilson's daughter. The Wilsons had a failing marriage of convenience. There was evidence that Annie Wilson knew that her husband had taken steps to exclude her from his will and that she and Frumusa, who had been sexually involved, had discussed killing Mr. Wilson. Brenda Smith testified that the talk was nothing and that Frumusa had already admitted this sexual relationship to Brenda.

The prosecution alleged that Frumusa's anger towards the Wilsons motivated the crime. The Court of Appeal found the evidence of motive to kill the two Wilsons was weak at best.

⁴⁸ (1996), 112 C.C.C. (3d) 211 (Ont. C.A.).

Though Frumusa provided clothing and bodily substance samples to the police, no forensic evidence was found linking him to the murders.

The Court concluded that the Crown's case consisted of evidence of circumstances and an alleged confession by Frumusa to C. The latter (as was the case for Guy Paul Morin) was the only direct evidence against Frumusa.

C and Frumusa were drug traffickers, each with a serious criminal record. At the material time, Frumusa owed C drug-related monies. C claimed at trial that the night before the murders Frumusa had taken him to a house and promised to get him the money from that house. (Other witnesses cast doubt on whether such a meeting ever occurred.) C claimed that Frumusa contacted him from jail after his arrest. C quoted from the conversation:

When I got on the phone, I asked, "What the hell's goin' on?" And I was really upset and he was saying "Take it easy", I said "What about my money", you know and he was sayin' "Take it easy, you'll get it", and I said "Did you do it?" He goes "Yeah, but I got it beat". So I said, "What's goin' on, then, what are you calling me for?" He was havin' a little bit of problems in Thorold.

Shortly after Frumusa was charged with murder, C was charged with unrelated criminal offences. C told the police about the confession only after they agreed to C's bail and to his charges being dropped.

After Frumusa's convictions, the defence sought to introduce, on appeal, certain evidence discovered after the convictions: (1) the witnesses Cameron and Thorne and (2) the evidence which C gave as a Crown witness in two unrelated cases while Frumusa's appeal was pending.

Cameron had a lengthy criminal record. He knew Frumusa as a heavy drug user and seller for a man named Vaccaro, who told him that Annie Wilson and Brenda Smith owed a lot of money for their drugs. Cameron also knew C as a tough guy for hire, a violent bully, drug dealer and heavy drug user. A few days before the murder, Cameron was present at a meeting with C and other drug dealers, one of whom was angry because Frumusa had not paid him. It was agreed that "they both (presumably meaning Frumusa and his girlfriend) pay the ultimate price." Cameron, then an R.C.M.P. informant,

reported what he had witnessed — he thought it was a plan for C to kill Frumusa and his girlfriend. The night of the murders, he saw C leave with other named individuals. They returned early the following morning and told Vaccaro it was done. C's clothing and body showed blood stains. Vaccaro said "See what happens when people fuck with us" and "You don't have to worry about Annie any more." Several days later, C told Cameron and another man that "When I hit the old bastard, the blood just flew."

Sherry Thorne was a prostitute who lived with C for a short time. He was selling drugs. He was a dangerous man. He told her he was paid to assault others and she witnessed a beating. He also told her he would provide information to the police when it suited him to do so. She said he lied continuously and could not be trusted. Some time later, he admitted to her that he had lied to the police about Frumusa because he wanted to negotiate a deal to avoid going to jail.

While Frumusa's appeal was pending, C was a Crown witness in two unrelated cases. In *R. v. Walker*,⁴⁹ he falsely testified to a conversation with the accused, calculated to convict him of first degree murder. In *R. v. Buric et al.*,⁵⁰ he testified for the Crown that he had participated in a scheme to fabricate evidence at the accused's request. In both cases he had provided Crown evidence when in personal jeopardy and after receiving assurances or in the hope of favourable treatment.

In the *Walker* case, C alleged that Walker had not only admitted the killing to him, but that Walker told C that he planned it. C's testimony at trial revealed that he had given the police four statements radically different and untrue, one implicating an innocent stranger and two calculated to convict Walker of first degree murder. C admitted that he hoped to avoid a murder charge by giving the police the statements. C's testimony at the Walker trial revealed that he had been under psychiatric care for many years and had been convicted of several more crimes since he testified about Frumusa. Sherry Thorne testified for the defence in the Walker case and was not cross-examined. At the conclusion of the Walker trial, Crown counsel told the jury

⁴⁹ (1994), 90 C.C.C. (3d) 144 (Ont. C.A.); "C" is referred to as "Able" in this judgment

⁵⁰ (1996), 106 C.C.C. (3d) 97 (Ont. C.A.).

that his own witness C was a liar and they should not convict on his evidence. Walker was convicted only of manslaughter.

A year later, C testified at the *Buric* trial that, while in jail, he met Buric who sought his assistance to have one Steve McLean give false evidence implicating others. C admitted that he gave this information to the police in return for witness protection and relocation. He admitted that, when he agreed to cooperate in the Frumusa case, he expected to be charged himself with the Wilson murders. He was also cross-examined regarding his false testimony in the Walker case.

The Crown contended on the Frumusa appeal that Cameron and Thorne's evidence should not be admitted as fresh evidence on appeal because it could have been discovered by due diligence. The Court rejected that argument. As well, the Court was unpersuaded that a formidable circumstantial case against Frumusa existed. Both Cameron and Thorne were reasonably capable of belief.

The Court of Appeal further concluded that C's evidence at the *Walker* and *Buric* trials indicates

a scheme on C.'s part to provide information and testimony, without regard for truth, to deflect suspicion from himself, or obtain preferential treatment in return. His evidence in the trial of Buric regarding his testimony at the appellant's trial demonstrates this pattern. It is to the effect that he was suspected of the Wilson murders, and expected to be charged, and so he agreed to co-operate and told the police that the man they had charged had confessed to him.

The Court also noted that the direction to the jury by the trial judge in *Buric* and the position of Crown counsel in *Walker* were compelling. Both of them virtually rejected C's testimony as unbelievable because of his lack of credibility. In his closing address to the jury at the *Walker* case, the Crown attorney impugned the testimony of his own witness, C, as follows:

Frank C.'s evidence, ladies and gentleman is the only evidence of planning and deliberation...His evidence provides you with the only basis upon which to find John Walker guilty of first degree murder, the only

basis. And he is a liar. And ladies and gentlemen, on the part of C.'s evidence that shows planning and deliberation I cannot ask you in good conscience to act, and I ask you, ladies and gentlemen-it is your choice, it is your duty, it is your responsibility, it is your job, but I ask you to find John Walker not guilty of first degree murder. C. is a liar and a criminal..Do not rely on his evidence to find this man guilty of first degree murder.

In the *Buric* case, the trial judge warned the jury as follows:

I would say to you that he is an unsavoury character in the extreme, and I repeat the other parts in my warning that you can accept his evidence if you wish, but you should in my view look for confirming evidence. In my view, your search will be fruitless in that regard as to the important part of the evidence. I ask you to keep in mind this man's apparent and admitted past in being a liar, a perjurer, and obstructor of justice, a police informer and a bully. I would suggest to you that he has absolutely no conscience and absolutely no regard for the solemnity of an oath.

R. v. Simmons⁵¹

In this case, the Ontario Court of Appeal allowed the accused's appeal against conviction.

McGuinty was a jailhouse informant who had offered to testify in return for favours from the Crown *on three prior occasions*. Although the witness claimed that in this instance he had not sought, nor been offered, a reward, the Court of Appeal concluded that "the jury should have been warned that they should treat this assertion with extreme caution":

This was an unsavoury witness. He had a criminal record, including crimes of dishonesty. His circumstances at the relevant time were that he had been released on two different bails and directed by those bail conditions not to drink alcohol, not to drive

⁵¹ [1998] O.J. No. 152 (Ont. C.A.).

and to obey a curfew. The witness violated all three conditions and was arrested and detained at the Barrie Jail where he first met the appellant. He was again released prior to trial on a third bail in a exchange for giving information to O.P.P. officers regarding a drug deal. It was necessary for the Crown to issue a material witness warrant to compel his attendance at trial. A clear and sharp warning as to the risk of accepting the evidence of such a manifestly unreliable witness was necessary.

The Court of Appeal also noted that "the evidence of the witness was very prejudicial to the appellant in a case which relied almost exclusively on circumstantial evidence." A new trial was ordered.

(ix) Panel of the Wrongfully Convicted

As I elsewhere noted, during Phase VI of the Inquiry, AIDWYC organized a panel of persons who had been wrongfully convicted of serious crimes. Their evidence is elaborated upon in a later chapter.

For the purposes of this chapter, it is important to note that jailhouse informants were called as witnesses in the cases against several of the wrongfully convicted persons on the panel.⁵²

In particular, on this issue, Mr. Carter articulated a very strong position on the need for reform:

[J]ailhouse informants are not a rare breed. They do it in order to buy themselves some time ... in my judgment, testimony of that kind from a jailhouse informant ought never, ever, ever be allowed in a court room.

(x) Miscellaneous Materials

In framing my recommendations, I also drew upon the literature

⁵² There were seven panelists: Rubin Carter, Rolando Cruz, David Milgaard, Joyce Milgaard, Joyce Ann Brown, Patrick Maguire, and Rick Norris.

collected by my staff (and made available to all parties) which addresses the use of jailhouse informants throughout the world. As pointed out before, an excellent discussion paper was prepared by Chris Sherrin for the use of all parties at this Inquiry.⁵³ I also heard from several systemic witnesses as to the role that jailhouse informants have played in miscarriages of justice in various jurisdictions. Their evidence, which relates to the multiple causes of wrongful convictions, is summarized in a later chapter. As well, I have relied on the written and oral submissions made during the final phase of this Inquiry.

(xi) Definition

For purposes of the recommendations which follow, an in-custody informer is someone who:

- (a) allegedly receives one or more statements from an accused**
- (b) while both are in custody, and**
- (c) where the statements relate to offences that occurred outside of the custodial institution.**

The accused need not be in custody for, or charged with, the offences to which the statements relate.

Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

This definition is similar to that contained in the present Crown Policy Manual. It is also similar to that contained in California legislative provisions and in the Los Angeles District Attorney's policy manual.

⁵³ Christopher Sherrin, "Jailhouse Informants, Part I: Problems with their Use", and "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform" (1997), 40 *Crim. L.Q.* 106, 157.

(xii) Recommendations

Recommendation 36: Ministry guidelines for limited use of informers.

In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove.

In the face of serious concerns about the inherent unreliability of in-custody informers, the decision whether to tender their evidence should be regulated by Ministry guidelines. The Ministry of the Attorney General should substantially revise its existing guidelines, in accordance with the specific recommendations below, to significantly limit the use of in-custody informers to further a criminal prosecution.

AIDWYC suggests that the evidence of in-custody informers be absolutely prohibited. The Morins suggest that the evidence should be prohibited unless the alleged confessions are recorded on tape, handwritten by the accused, supported by a witness who is not an in-custody informer, or unless the statements contain reference to previously unknown facts, subsequently substantiated by the authorities. The Criminal Lawyers' Association concedes that a ban of in-custody informer evidence is not a viable alternative. The C.L.A. submits that the state's recognized interest in convicting those guilty of serious criminal offences cannot simply be ignored. It is impossible to draw meaningful legal distinctions between informants and other unsavoury witnesses. As the C.L.A. notes:

Although attractive arguments can be made for exclusion of jailhouse informant evidence in particular circumstances, to say that no matter what the factual specifics, such evidence ought to be excluded, is not tenable.

The Criminal Lawyers' Association suggests that such testimony should be inadmissible in law unless corroborated; as well, prosecutors should be required to follow strict policies in their dealings with in-custody informers.

Each suggestion was motivated by the recognition that this evidence

is inherently unreliable (though not necessarily so in every case), that such evidence has contributed to a number of miscarriages of justice and that jurors may be unable to fully evaluate the extent of its unreliability. These concerns are completely warranted on the record before me.

I know of no jurisdiction in the world where this category of witness has been banned. Indeed, a total or partial prohibition runs against the grain of Canadian jurisprudence and is unlikely to acquire legislative or judicial acceptance. To paraphrase Dickson J. (as he then was) in *R. v. Vetrovec*,⁵⁴ the construction of a universal rule singling out in-custody informers as automatically unreliable would reduce the law of evidence to blind and empty formalism. Similarly, we have moved away from mandatory corroboration of individual pieces of evidence as a function of admissibility.⁵⁵ I prefer that corroboration be addressed in the context of the exercise of prosecutorial discretion, through the imposition of stringent guidelines which preserve such discretion but place limitations upon it for this special category of witness.

The policy guidelines produced by the Ministry of the Attorney General do not nearly go far enough to address the problems that jailhouse informants present. The specific recommendations which follow address the inadequacies of the present policy.

Recommendation 37: Crown policy clearly articulating informer dangers.

The current Crown policy does not adequately articulate the dangers associated with the reception of in-custody informer evidence. Further, the statement that such witnesses “may seek, and in rare cases, will receive, some benefit for their participation in the Crown’s case” does not conform to the extensive evidence before me. The Crown policy should reflect that such evidence has resulted in miscarriages of justice

⁵⁴ [1982] 1 S.C.R. 811.

⁵⁵ Mr. Weinberg suggested that a corroboration requirement is a less meaningful protection than the court’s ability on a *voir dire* to exclude unreliable jailhouse informant evidence since informants are motivated to recruit untruthful corroboration. I urge consideration of a *voir dire* for informant evidence below in recommendation 59: Reliability *voir dire*s for informer evidence.

in the past or been shown to be untruthful. Most such informers wish to benefit for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one.

Mr. Weinberg testified that he has never experienced a 'good citizen' informant. He regarded the statement in the present Crown policy as completely antithetical to his understanding and experience of what currently motivates almost all informants, which is their hope and expectation of receiving a benefit, and the reality that they do receive benefits. It troubled him that a statement to the contrary would form part of the policy's preamble.

Mr. Sundstedt similarly disagreed with the policy statement that benefits are rarely received. In his view, there may be rare occasions when a witness incarcerated on a minor offence did not want anything. Otherwise, informants do not cooperate because they have an interest in effective law enforcement or from any sense of moral duty. Richard Wintory reflected that most informants cooperate, not because it is the right thing to do, but because it is the right thing for them. In Ontario (as reflected in the Crown survey), it may be true that benefits are less often offered up by prosecutors. Even if true, it is dangerous to assume that in-custody informers here are any less motivated to act in their own self-interest than in other jurisdictions.

Recommendation 38: Limitations upon Crown discretion in the public interest.

The current Crown policy provides that the use of an in-custody informer as a witness should only be considered in cases in which there is a compelling public interest in the presentation of their evidence. This would include the prosecution of serious offences. Further, it is unlikely to be in the public interest to initiate or continue a prosecution based only on the unconfirmed evidence of an in-custody informer. The policy should, instead, reflect that (a) the seriousness of the offence, while relevant, will not, standing alone, demonstrate a compelling public interest in the presentation of their evidence. Indeed, in some circumstances, the seriousness of the offence may militate against the use of their evidence; (b) it will never be in the public interest to initiate or

continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

I accept without hesitation Mr. Sundstedt's testimony (confirmed in the Los Angeles District Attorney's policies) that it can never be in the public interest to initiate or continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

Recommendation 39: Confirmation of in-custody informer evidence defined.

The current Crown policy notes that confirmation, in the context of an in-custody informer, is not the same as corroboration. Confirmation is defined as evidence or information available to the Crown which contradicts a suggestion that the inculpatory aspects of the proposed evidence of the informer was fabricated. This definition does not entirely meet the concerns that prompt the need for confirmation. Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another.

The present policy was correctly crafted to reflect that confirmation must relate to the reliability and accuracy of the purported confession itself, rather than simply be confirmation of the accused's guilt generally. My recommendation is intended to enhance that policy by ensuring that the confirmation truly supports, in a significant way, the reliability and accuracy of the informer's testimony. Mr. Sundstedt noted that one in-custody informer cannot amount to strong corroborative evidence of another informer, for purposes of the Los Angeles policy guidelines. I agree with that approach.

The Los Angeles District Attorney's policy was modified to remove any perceived requirement that confirmation must consist of evidence in the defendant's voice or handwriting. I agree that the presence or absence of such evidence is relevant, but should not be mandated in every case.

Recommendation 40: Approval of supervising Crown counsel for informer use.

The current Crown policy provides that, if the Crown's case is based exclusively, or principally, on evidence of an in-custody informer, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The policy should, instead, reflect that, if the prosecutor determines that the prosecution case *may rely, in part*, on in-custody informer evidence, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The Ministry of the Attorney General should also consider the feasibility of establishing an In-Custody Informer Committee (composed of senior prosecutors from across the province) to approve the use of in-custody informers and to advise prosecutors on issues relating to such informers, such as means to assess their reliability or unreliability, and the appropriateness of contemplated benefits for such informers.

In Los Angeles, approval for the use of a jailhouse informant must be obtained not only from the prosecutor's supervisor, but from the Jailhouse Informant Committee. Paul Culver, a senior prosecutor responsible for Canada's largest trial prosecutors' office (Toronto/York Central Region), noted that mid-trial issues sometimes make it impracticable for Committee approvals. As well, Ontario's geographical extremities, unlike Los Angeles, may make Committee approval less feasible. In my view, a Committee of senior prosecutors could provide important direction not only on the potential use of an informer at trial, but also on the proposed benefits, if any, to be conferred. Some of the Directors of Crown Operations may have limited or no exposure to jailhouse informants. I would hope that the Ministry would favourably consider the formation of such a Committee, with appropriate recognition of the logistical issues properly raised by the witnesses. One solution to these issues is to recognize that Committee approval need not be sought in exigent circumstances.

Recommendation 41: Matters to be considered in assessing informer reliability.

The current Crown policy lists matters which Crown counsel may take into account in assessing the reliability of an in-custody informer. Those matters do not adequately address the assessment of reliability and place undue reliance upon matters which do little to enhance the reliability of an informer's claim. The Crown policy should be amended to reflect that the prosecutor, the supervisor or any Committee constituted should consider the following elements:

1. The extent to which the statement is confirmed in the sense earlier defined;
2. The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;
3. The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;
4. The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused. This consideration need involve an assessment of the information reasonably accessible to the in-custody informer, through media reports, availability of the accused's Crown brief in jail, etc. Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be unaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement;
5. The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;

6. Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;
7. Whether the informer has, in the past, given reliable information to the authorities;
8. Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;
9. Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;
10. Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;
11. The circumstances under which the informer's report of the alleged statement was taken (*e.g.* report made immediately after the statement was made, report made to more than one officer, etc.);
12. The manner in which the report of the statement was taken by the police (*e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be

encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or videotape, in accordance with the guidelines set down in *R. v. K.G.B.*⁵⁶ However, in considering items 10 to 12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence;

13. Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;
14. Any relevant information contained in any available registry of informers.

The matters to be considered by prosecutors which are presently listed in the Crown policy are, with respect, somewhat inadequate. They heavily emphasize the accurate and contemporaneous recording, under oath and on videotape of an informant's claim. It is indeed extremely important that such a record of an informant's claim be taken. However, as Mr. Sundstedt noted, the policy incorrectly assumes that the reliability of an informer's claim will be enhanced by its accurate recording under oath by the authorities. The above elements which I suggest be considered by prosecutors, place appropriate emphasis on those matters which truly enhance or detract from the reliability of an informer's claims. They draw upon the evidence of Mr. Dalton, Mr. Sundstedt, Mr. Weinberg, Mr. Wintory, Mr. Sheriff and others. All of these matters were put to Mr. Griffiths by Commission counsel (See *Exhibit 298, Appendix M*). Mr. Griffiths largely adopted these recommended changes, with some refinements. Most of Mr. Griffiths' refinements have been incorporated into the above language.

Item 5 may also include any psychiatric or psychological profile, if known to the authorities. Access to psychiatric or psychological material raises special problems, which are addressed below in recommendation 50: Access to confidential informer records.

⁵⁶ (1993), 79 C.C.C.(3d) 257 (S.C.C.).

The Los Angeles District Attorney's policy provides that the corroboration must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement. Of course, this arises out of the proven, widespread abilities of informants there to access such details. This may be an appropriate limitation in Los Angeles. The tenor of Mr. Sheriff's evidence, with which I agree, is that the disclosure of information which, reasonably viewed, is only known to the authorities (and, of course, the perpetrator) may constitute important confirmation. I have adopted this approach, together with a cautionary note that prosecutors should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be inaccessible to them. Prosecutors are also instructed to assess what information is reasonably accessible to the informant through sources such as the media.

AIDWYC suggests that Crown counsel should be required to "make active inquiries" respecting the reliability of an in-custody informer. The current Crown Policy Manual reflects that Crown counsel "should ensure that the background of the informer has been appropriately investigated. Part of this police investigation should include a review of any available registry of informers." In my view, a delineation has to be made between the police — whose duty it is to investigate — and Crown counsel, who should not be investigators. In my view, the recommendations which I have made, together with the current Crown policy, contemplate that Crown counsel should ensure that the police have performed the active investigation required of them into the reliability of an in-custody informer. Crown counsel are then obligated to review the fruits of that investigation in assessing reliability.

Martin Weinberg testified that prosecutors (albeit well-intentioned) are sometimes not motivated to scrutinize the character and background of their informant:

I think that's the problem, is the extent to which they receive testimony that corroborates their -- confirms their predispositions towards believing a person to be guilty, and that they don't scrutinise or require the scrutiny of that information with the same vigour or tenacity that they would information that pre-existed their development of the case against a particular defendant.

In my view, the present policy, together with my recommended changes, adequately addresses this issue.

Mr. Griffiths raised the justifiable concern that some of the matters listed above will not be known to prosecutors. In my view, it is important that police investigators become conversant with these matters and incorporate them, where possible, into their interviews with in-custody informers.

Recommendation 42: Limited role of Crown counsel conferring benefits.

Crown counsel involved in negotiating potential benefits to be conferred on an in-custody informer should generally not be counsel ultimately expected to tender the evidence of the informer. This recommendation supports the current Crown policy in Ontario.

Recommendation 43: Agreements with informers reduced to writing.

The Ministry of the Attorney General should amend its Crown Policy Manual to impose a positive obligation upon prosecutors to ensure that any agreements made with in-custody informers relating to benefits or consideration for co-operation should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and his or her counsel (if represented). An oral agreement, fully reproduced on videotape, may substitute for such written agreement. As well, in accordance with present Crown policy, any such agreements respecting benefits or consideration for co-operation should be approved by a Director of Crown Operations.

The recommendation that such agreements be memorialized in writing was supported by Mr. Griffiths and Ms. Dana Venner, another senior Crown counsel whose evidence I relied upon. Ms. Venner, who has responsibilities under the witness protection program, confirmed that this recommendation is similar to the approach taken with witnesses under that program. Mr. Weinberg advised that, in the United States, a plea agreement involving benefits is signed by the prosecutor, the informant and his or her counsel, and ratified under oath by a judge who determines whether the informant understands the limitations and scope of benefits incorporated into

the plea agreement. In *R. v. Dikah and Naoufal*,⁵⁷ Doherty J.A. noted at 335:

I see great merit in committing a compensation agreement with an agent to writing so that there can be no doubt at trial as to the terms of the agent's employment. The impact of those terms on the agent's reliability as a witness can then be fully considered by the trier of fact.

Recommendation 44: Restrictions upon benefits promised or conferred.

(a) An agreement with an in-custody informer should provide that the informer should expect no benefits to be conferred which have not been previously agreed to and, specifically, that the informer should expect no additional benefits in relation to future or, as of yet, undiscovered criminality. Indeed, such criminality may disentitle the in-custody informer to any benefits previously agreed to but not yet conferred.

(b) Where the in-custody informer subsequently seeks additional benefits nonetheless (particularly in connection with additional criminal charges which he or she faces or may face) prior to the completion of any testimony he or she may give, Crown counsel (and, where practicable, any supervisor or Committee constituted) should re-assess the use of the in-custody informer as a witness in accordance with the criteria set out in the Crown Policy Manual.

(c) Where additional benefits (that is, benefits not previously agreed to or necessarily incidental to a prior agreement) are sought by the in-custody informer subsequent to his or her completed testimony (particularly in connection with additional criminal charges which he or she faces or may face), they should not be conferred by Crown counsel. Indeed, Crown counsel should advise the Court addressing any additional criminal charges that the informer was made aware that he or she could not expect additional benefits in relation to future or, as of yet, undiscovered criminality when the earlier agreement was reached, and that the informer is not entitled to any credit from the court for past

⁵⁷ (1994), 89 C.C.C. (3d) 321 (Ont. C.A.); aff'd (1994), 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*).

co-operation.

(d) The commission of additional crimes should generally disqualify the witness from future use by the prosecution as a jailhouse informant in other cases.

Contrary to the practice commonly adopted in the United States, the evidence overwhelmingly supports the view that benefits ought to be fixed prior to an informant's testimony, so that they can be fully disclosed to the defence and to the triers of fact who must assess the informant's credibility. New benefits, not previously agreed upon, should generally not be conferred, unless reasonably related to the original agreement — for example, new security issues arising out of the prior involvement of the informant that need be addressed.

Difficult issues arise where the informant requests new benefits either before or after his or her cooperation is completed. Not uncommonly, the informant's requests relate to criminal charges which the informant now faces or may face.

Mr. Weinberg suggested that a request for additional benefits during the trial must be disclosed and should motivate a prosecutor to reconsider the use of that informant at trial. If the informant commits new offences after agreement has been reached but before he or she testifies, the bare minimum response ought to be the invalidation of any benefits and the prohibition against ever again utilizing or relying on that informant for cooperation that is related to future benefits. If recidivism does not permanently disable the informants from again receiving benefits, they are motivated to re-inform in other cases to start the process again. Benefits should never be conferred upon an informant in relation to offences committed after his or her testimony has been completed.

Mr. Sundstedt testified that additional benefits after the agreement has been reached should be prohibited as a matter of policy, absent exigent circumstances. Such a policy should prohibit or at least direct a re-evaluation of the continuing conferral of benefits upon an informant who re-offends. In the least, such a policy should dictate that no benefits relating to those further offences should be conferred. He emphasized that policies should always be subject to exigent circumstances or subject to direction from a supervising

prosecutor. He recognized that the administration of justice would benefit if prosecutors were not allowed to make agreements with informants after their testimony is completed, again subject to exigent circumstances. He suggested that a judicial officer should be the arbiter of such benefits. Mr. Sundstedt hoped that the future use of a re-offender as an informant would be extinguished.

Though Mr. Wintory preferred that prosecutors not be required to specify in advance the benefits to be conferred (a view with which I disagree), he agreed that there must be a consequence to the commission of further crimes by an informant.

Mr. Sheriff indicated that it is wrong to give promises of future assistance for future crimes committed by the informant.

My recommendations draw upon the evidence of these witnesses and the recommendations made by the Los Angeles grand jury. I have not suggested inflexible rules, but rather general policies which can be relieved against in exceptional circumstances.

Ms. Venner and Mr. Griffiths agreed with the tenor of these recommendations. Indeed, they are again similar to those practices in place for witnesses under the witness protection program.

Recommendation 45: Conditional benefits.

Any agreement respecting benefits should not be conditional upon a conviction. The Ministry of the Attorney General should establish a policy respecting other conditional or contingent benefits.

There appears to be a strong judicial support for the view that benefits offered to a witness which are conditional upon the conviction of the accused should be prohibited by policy: see *R. v. Xenos*.⁵⁸ In *R. v. Dikah and Naoufal*,⁵⁹ an agent entered into an agreement with the R.C.M.P. to assist

⁵⁸ (1991), 70 C.C.C. (3d) 362 (Que. C.A.).

⁵⁹ (1994), 89 C.C.C. (3d) 321 (Ont.C.A.); aff'd 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*).

them in the investigation into the suspected criminal activities of certain persons. He also agreed to testify in related criminal proceedings. The R.C.M.P. was to provide him with a cash payment as a fee for his services, not to exceed \$10,000, at the conclusion of his involvement, based upon factors such as the length and complexity of the investigation, the degree of risk he was exposed to and the time involved. He acknowledged that he could not anticipate full payment of the fees unless the R.C.M.P. was able, through his assistance, to successfully investigate some or all of the suspects. The trial judge stayed the proceedings, finding the agreement offensive:

I cannot think that payment to an informant contingent on successfully charging the suspect would ever be a proper law enforcement technique. It invites corruption. It prejudices the informant from the beginning by inviting him to put a spin on his evidence, to blur, shade and fabricate it so that charges can be laid and he can pocket more money ... There is no doubt that when the police pay for information as a "necessary evil" of drug investigations, that information is inherently suspect. However, when they pay more for information leading to the result they want and there is no other independent evidence, the reliability of the agent's evidence and his credibility becomes even more suspect.

On appeal, the Court of Appeal distinguished the arrangement in *Xenos*. Doherty J.A. found nothing offensive in considering the success of the operation when determining the amount to be paid to the agent. He concluded:

Agent 21's compensation was in no way related to any testimony he might give at trial. He was paid in full long before he testified. In *Xenos*, the witness was to be paid a certain amount of money if he testified in a certain manner. This arrangement may well be a "direct invitation to perjury and the fabrication of evidence"... in that the promise of payment may induce the witness to testify in a certain manner regardless of the truth of that testimony. Nothing in the agreement with Agent 21 made his compensation dependent on the content of his evidence, or the result of the trial.

The Court also concluded that, in any event, a stay was inappropriate

and the effect of the agreement upon the agent's credibility could be fully explored at trial.

With respect, I express no views on the correctness of this decision or the propriety of the specific agreement. I have highlighted the issue, however, since it must be addressed in the context of a review of Ministry policy respecting conditional or contingent benefits. Without reflecting one way or the other upon the correctness of *Dikah*, I am compelled to say that the evidence I have heard about benefit-driven informants raises a concern in my mind that the justice system has, at times, underestimated the dangers associated with benefit-driven testimony.

Recommendation 46: Policy on kinds of benefits conferred.

The Ministry of the Attorney General should establish a policy which sets limitations on the kinds of benefits that may be conferred on jailhouse in-custody informers or appropriate preconditions to their conferral.

As I said before, I do not favour an absolute ban on jailhouse informant evidence. I note that several witnesses indicated that such a ban would preclude the testimony of an informant, in custody on a minor offence, who seeks no benefits and has no self-interest in fabricating a confession. This position raises an interesting issue: rather than a ban on such witnesses, should there be a ban upon the conferral of any benefits on jailhouse informants whatsoever, other than protective measures that ensure the safety of the informant?⁶⁰

The Los Angeles grand jury did not suggest that some favourable treatment should never be given in return for valuable assistance in appropriate cases. Indeed, the grand jury said that the prosecution must have the discretion to determine what consideration is appropriate. It was noted that the first breakthrough in the notorious Manson Family case was attributed to a jailhouse informant. On the other hand, the grand jury

⁶⁰ I am not addressing whether benefits should be conferred on non-testimonial informers or jailhouse witnesses whose testimony relates to criminal activities which they allegedly witnessed or activities involving both the accused and themselves.

specifically noted that it also did not suggest that favourable treatment was an advisable course:

One expert summarized his philosophy as ‘I don’t reward anybody for anything.’ Based on his experience, he opined that offering rewards for information to convicts merely encourages them to fabricate information. He stated “Ninety-five percent of the stuff [information] you get is bogus.”

It may be that a number of the Ontario prosecutors who participated in the Crown survey share that view in light of their responses to benefit-related questions. Cases such as the informant who advised the prosecutor, once desired benefits were not forthcoming, that “the more he thought about it, the more he believed his conversation with the defendant never took place,” certainly demonstrate the corrupting effect of a benefit system.

One prominent American defence attorney, Barry Tarlow, has noted that the ABA Model Code of Professional Responsibility provides:⁶¹

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.

ABA Model Code Ethical Consideration 7-28 states:

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness.

Tarlow argues:

Federal and state laws criminalize giving inducements to witnesses in exchange for partial testimony. Prosecutors believe they have secured for themselves a *de facto* exemption to these ordinary rules that

⁶¹ Barry Tarlow, “The Moral Conundrum of Representing the Rat” (August, 1995) *The Champion*, 15.

prevent purchasing testimony. However, a defence lawyer [considering whether to permit his/her client to become a rewarded prosecution witness] should be able to refuse to help prosecutors exploit this special exemption that prosecutors claim to the ethical constraints that apply to attorneys generally.

Mr. Wintory was asked by Commission counsel whether benefits should ever be given to jailhouse informants:

A. You start from the premise that if you want to solve crime, that people who know about the crime are not people who are going to cooperate because it's the right thing to do. They will cooperate because they decide it's the right thing to do for them.

Q. All right. Could I ask you a question: Why, why not just slap them with a subpoena, and bring them to court?

A. Well, of course, if you'd had any time in prosecution, or as any lawyer, I'm sure you know that that's a terrific system for somebody who will tell the truth because they believe it's the right thing to do.

Q. These people don't believe it's the right thing to do to tell the truth?

A. Absolutely.

Q. Okay.

A. Any more than a defendant does.

Q. I'm interested as a matter of — sort of philosophically. I mean, suppose you had an eye witness who was not in the jail, who came up and said: You know, I saw the robbery, but I don't want to tell you about it unless you give me \$1,000.00. Not a very nice person. Would you pay that \$1,000.00 to the person outside the jail in order to be able to get her evidence?

A. That's exactly how most crime-stoppers and reward programs work.

Q. They do that?

A. Absolutely. And obviously, that payment dramatically reduces the credibility that they have. It's a shameful thing, if it has to be done, it's a shameful thing that they have to have that as a precondition, but if that testimony is reliable, should I go to the family of a raped little girl, a murdered little girl, and say: I'm sorry, I've got an eyeball witness, but because I think it's morally reprehensible that this person won't do the right thing, I'm going to ignore that truth. I don't think that lets right prevail.

With respect, I do not draw any comfort from any practice that would encourage payments even to eyewitnesses for their testimony.

Finally, it can be argued that a policy that rewards jailhouse informants in some circumstances, known to the inmate population, encourages the manipulation of the system and inhibits the solicitor-client relationship for inmate accused. A no-benefit policy, known to the inmate population, might cause some truthful inmates to remain silent, but would improve the odds that those coming forward are indeed truthful. I have no doubt that, had Mr. May and Mr. X known that no benefits could be forthcoming for cooperation, we would never have heard from either of them.

Nevertheless, and with some reluctance, I am not prepared to recommend that the conferral of benefits on jailhouse informants should be banned.⁶² Again, such a ban would run against the grain of existing Canadian jurisprudence. Situations do exist where such benefits result in testimony which has subsequently been fully verified and is, therefore, reliable. Informants may expect benefits to be conferred, even in the face of a purported ban. Informants may contemplate that they will use their co-operation (for example, in submissions to a sentencing judge), even in the absence of any agreement with Crown counsel. In these circumstances, juries considering the testimony of jailhouse informants may be misled by the existence of a ban into thinking that the informants are motivated by altruism only.

⁶² See for example, *Palmer & Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 (S.C.C.).

However, the potential corrupting effect of benefits is very significant. It should form part of any educational programming for prosecutors relating to such informers. As well, the Ministry of the Attorney General should consider what limitations should be placed upon the kinds of benefits which may appropriately be conferred. Peter Griffiths acknowledged that consideration has not yet been given to any limits upon benefits conferred. The Crown Policy Manual addresses the need to obtain approval for benefits and the procedures associated with that approval process. There is no guidance as to what kinds of benefits are properly conferred. California legislation limits monetary benefits which can be conferred upon jailhouse informants. In my view, parameters need be set for such benefits here as well.

Recommendation 47: Disclosure respecting in-custody informers.

The current Crown policy reflects that the dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Without limiting the extent of that onus, the policy lists disclosure items that should be reviewed to ensure full and fair disclosure. The disclosure policy is generally commendable. Some fine-tuning of the items listed is required to give effect to the onus to make complete disclosure. The items should read, in the least:

1. The criminal record of the in-custody informer including, where accessible to the police or Crown, the synopses relating to any convictions.
2. Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's statement, should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.)
3. Any offers or promises made by police, corrections authorities, Crown counsel, or a witness protection program to the informer or person associated with the informer in consideration for the information in the present case.

4. Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities, including but not limited to those kinds of benefits already listed in the Crown Policy Manual.
5. As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed and/or be recorded on videotape. Such arrangements should be approved by a Director of Crown Operations or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier, in accordance with *Stinchcombe*).
6. Copies of the notes of all police officers, corrections authorities or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in-custody informer. There may be additional notes of officers or corrections authorities which may also be relevant to the in-custody informer's testimony at trial.
7. The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.
8. If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.

Many of these items are already contained, in substantially the same form, in the present Crown manual. I have suggested some changes broadening disclosure to accommodate the evidence before me. For example, I recommend that disclosure extend not only to benefits conferred, but also to benefits sought by the informer, whether or not conferred. A similar change was reflected in Recommendation 41.

As noted elsewhere, disclosure of psychiatric or psychological materials relating to the informant raises special issues, addressed in Recommendation 50, below.

Recommendation 48: Post-conviction disclosure by Crown counsel.

The Ministry of the Attorney General should remind Crown counsel of the positive and continuing obligation upon prosecutors to disclose potentially exculpatory material to the defence post-conviction, whether or not an appeal is pending. Such material should also be provided to the Crown Law Office.

The current Crown Policy on disclosure reflects the principles articulated in this recommendation. In light of the evidence heard during this Inquiry, the Ministry should take steps to reinforce the significance of these principles in the minds of all Crown counsel.

Recommendation 49: Post-conviction continuing disclosure by police

The Durham Regional Police Service should amend its operational manual to impose a positive and continuing obligation upon its officers to disclose potentially exculpatory material to the Durham Crown Attorney's Office, or directly to the Crown Law Office, post-conviction, whether or not an appeal is pending. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 50: Access to confidential informer records.

A Joint Committee on Disclosure Issues should consider potential policy changes to effect broader access by police, prosecutors and defence counsel to confidential records potentially relevant to the reliability of an in-custody informer.

In a later chapter, I recommend that a Joint Committee on Disclosure be created to address a number of important disclosure issues which continue to affect the administration of criminal justice in Ontario.

Most everyone agrees that police, prosecutors and defence counsel

should be fully informed, to the extent possible, about the antecedents, background and psychiatric and psychological profile of an in-custody informer to assist in the assessment of his or her reliability. Much of this information can be accessed without legal impediment — for example, the informant's criminal record and outstanding charges.

Important and difficult issues arise when the understandable interest in full access collides with privacy interests and specific restrictions on access mandated by the Supreme Court of Canada's decision in *O'Connor*⁶³ and section 278.2 of the *Criminal Code*. In my view, protocols can address a number of access issues without running afoul of the law. For example, to what extent should police and prosecutors seek the consent of an in-custody informer to access otherwise restricted records and to what extent should such consent be a precondition to any agreement between the prosecution and an in-custody informer? Similarly, to what extent should an in-custody informer be asked to submit to a psychiatric assessment at the instance of the prosecution or defence and what should follow if he or she refuses to be assessed? I have not heard sufficient evidence to set the appropriate protocols myself or to recommend specific legislative changes to the present statutory and common law regime, and this is, therefore, an appropriate matter for consideration by the Joint Committee on Disclosure Issues.

Recommendation 51: Prosecution of informer for false statements.

Where an in-custody informer has lied either to the authorities or to the Court, Crown counsel should support the prosecution of that informer, where there is a reasonable prospect of conviction, to the appropriate extent of the law, even if his or her false claims were not to be tendered in a criminal proceeding. The prosecution of informers who attempt (even unsuccessfully) to falsely implicate an accused is, of course, intended, amongst other things, to deter like-minded members of the prison population. This policy should be reflected in the Crown Policy Manual.

Martin Weinberg reflected that there is no widespread fear by informants that they will be prosecuted if they fabricate evidence. It is that

⁶³ *R. v. O'Connor*, [1995] 4 S.C.R. 411; 103 C.C.C.(3d) 1.

perception that, in some respects, fuels their willingness to be informants. Unless they fear that their sentences will be increased for lying, there is little counterweight to their motive to get out of jail. Weinberg indicated that as part of our system to try to improve their reliability, these informants must understand at a meaningful level that there are serious perils to perjury, not just that they will not get any benefits. I agree.

I appreciate that the legal requirement for corroboration may prevent the prosecution of some informants for perjury. (It is ironic that, in law, an accused can be convicted based on the uncorroborated evidence of a jailhouse informant, but such an informant cannot be convicted of perjury in the absence of corroboration.)

The Los Angeles grand jury also appreciated the difficulties in such prosecutions, but felt that clear cases nonetheless went unprosecuted. It is important that every consideration be given to these prosecutions, consistent with the burden of proof, or to alternative charges (such as public mischief or the giving of contradictory sworn evidence) where circumstances warrant.

Recommendation 52: Extension of Crown policy to analogous persons.

The current Crown policy defines “in-custody informer” to address one type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should, therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.

Recommendation 53: Revisions to police protocols respecting informers.

The Durham Regional Police Service should revise Operations Directive 04-17 to specifically address in-custody informers as a special class of informers. This directive should reinforce the inherent risks associated

with such informers, the need for special precautions in dealing with them and establish special protocols for such dealings. These protocols should also address the method by which an informant's reliability should be investigated. The Ministry of the Solicitor General should facilitate the creation of a similar directive for all Ontario police forces.

A number of parties, including the Durham Regional Police Service, supported such a recommendation. Various police forces have protocols governing confidential informants. There is a need to specifically address in-custody informers as a special class. Such protocols should stress the inherent risks associated with such informers (tracking the language used in Recommendation 37). Equally important, they should outline the appropriate investigative techniques to be used in interviewing an informer, how the interviews should be recorded, how benefits should be addressed and by whom, what questions should be directed to informers to assist in the assessment of reliability and ways in which informer reliability can be further investigated (tracking the language used in Recommendation 41).

As part of the investigation, police and custodial personnel should cooperate to ensure that the location of potentially relevant persons at the time of the alleged statement by the accused is recorded in the most timely way possible.

Recommendation 54: Creation of informer registry.

The Ministry of the Attorney General should establish an in-custody informer registry, designed to make available to prosecutors, defence counsel and police, information concerning the prior testimonial involvement of in-custody informers, any benefits requested, benefits agreed to or conferred, and any prior assessment of reliability made by police, prosecutors or the Court of an informer.

There was general consensus that such a registry would be welcome in Ontario. Indeed, I note that 66 percent of Crown counsel surveyed favoured such a registry; 75 percent felt that it would assist in determining whether they wished to call a jailhouse informant. The *Frumusa* and *Simmons* cases, cited above, underline the need for a central registry.

The registry should be maintained by the Ministry of the Attorney

General. Protocols as to its contents, defence access (and any limitations upon access due to confidentiality issues), and means of disclosure, should be established in co-operation with law enforcement personnel and the defence bar. The Los Angeles registry may provide useful guidance.

In my view, such a registry should also contain information pertaining to criminal charges against a jailhouse informant, past or present. Where an informant seeks benefits after his testimony is completed, this should also be recorded in the registry, together with any benefits conferred or received.

My recommendation as to the information to be contained in the registry is not intended to be exhaustive.

Recommendation 55: Crown contribution to informer registry.

The Ministry of the Attorney General should amend the Crown Policy Manual to impose a positive obligation upon prosecutors to provide relevant information to the registry and to ensure disclosure to the defence of relevant information contained in the registry.

Recommendation 56: Police contribution to informer registry

The Durham Regional Police Service should amend its operational manual to impose a positive obligation upon its officers to provide relevant information to the registry. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 57: Creation of national in-custody informer registry.

The Government of Ontario should use its good offices to promote a national in-custody informer registry.

The Morins suggest a national registry. Their rationale is that in-custody informers know no jurisdictional boundaries. A national registry ensures that an in-custody informer cannot present himself in different jurisdictions without full disclosure of their prior roles to police, Crown and defence counsel. I agree. Indeed, Mr. May's criminal activity in Ontario, Manitoba and British Columbia (though not as an in-custody informer in the

other jurisdictions) highlights the issue. Further, there is every reason to believe that jurisdictions other than Ontario would, in the very least, benefit from registries in their own jurisdictions.

Recommendation 58: Police videotaping of informers.

The Durham Regional Police Service should amend its operational manual to provide that all contacts between police officers and in-custody informers must, absent exceptional circumstances, be videotaped or, where that is not feasible, audiotaped. This policy should also provide that officers receive statements from such informers under oath, where reasonably practicable. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

In a later chapter, I discuss in some detail the desirability of videotaped interviews of the accused and certain important or contentious witnesses generally. There is no doubt that the videotaping of jailhouse informants is of critical importance, not only in the assessment of their credibility but also for the protection of the interviewer.

Recommendation 59: Reliability *voir dres* for informer evidence.

Consideration should be given to a legislative amendment, providing that the evidence of an in-custody informer as to the accused's statement(s) is presumptively inadmissible at the instance of the prosecution unless the trial judge is satisfied that the evidence is reliable, having regard to all the circumstances.

Jailhouse informant testimony should not be legally banned. Nor should corroboration be legally required. Prosecutorial discretion should be retained in relation to the tendering of such evidence, though significantly regulated. The existence or absence of confirmatory evidence should heavily factor in the exercise of that discretion. This approach is consistent with the jurisprudence and, indeed, the direction already reflected in Ontario Crown policy. I have earlier expressed these views.

The issue which I must then consider is whether a legislative amendment is desirable so that the reliability of such evidence should be assessed by the trial judge, on a *voir dire*, as a condition of its admissibility.

The testimony of the systemic witnesses varied on this issue. Mr. Wintory opposed such an approach. Mr. Sundstedt did not. Mr. Weinberg recommended it. Several prosecutors declined to comment on it. The parties to the Inquiry held divergent views.

David Butt⁶⁴ stated the position against such *voir dires* in a most articulate fashion. The theme of his evidence was reinforced in the written submissions of the Ontario Crown Attorneys' Association.

Mr. Butt submitted that the decision of the Supreme Court of Canada in *R. v. Buric*⁶⁵ was the appropriate one, namely that *voir dires* into unreliability ought not to be encouraged. He said:

[W]hat we need to focus on is the preservation of the adversarial mechanisms that will ensure full exploration of the reliability of any witness in front of a jury.

Mr. Butt saw juries as democracy in action. He felt that pre-vetting based upon reliability undermines the democratic aspect of the jury system and the confidence shown in juries, which has not been shown to be misplaced.

The Ontario Crown Attorneys' Association said this:

The idea that trial judges should exclude the evidence of an in-custody informant where that evidence is found to be inherently unreliable misses the mark. There is nothing unfair about a trial in which *prima facie* unreliable evidence is led. Recently, the Supreme Court of Canada in *R. v. Buric*, adopted the majority judgment of Labrosse J.A. in the Ontario Court of Appeal, who stated

The admission of evidence which *may* be unreliable does not *per se* render a trial unfair. It is for the jury to assess the quality of the

⁶⁴ As noted in Chapter II, Mr. Butt is a senior appellate counsel with the Crown Law Office.

⁶⁵ *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont. C.A.), *aff'd* (1997), 114 C.C.C. (3d) 95 (S.C.C.).

evidence.

.....

It has been said many times that modern juries are not unsophisticated with proper assistance from counsel and from the trial judge, they deal with most difficult issues. In my view, the trial judge underestimated the ability of the jury when he concluded, in effect, that the case was too difficult for them to decide. He was quite able to pick his way through the evidence on the *voir dire*; he cautioned himself on the danger of accepting the witness's evidence, and he reached his conclusion. I see no valid reason why the jury could not deal with this case in the same way he did. It is also in the best interest of society to have its most serious criminal charge resolved by a jury.⁶⁶

Other judgments may be cited where courts have stressed the capability of jurors and the system's dependence upon jurors to assess the reliability of evidence and the credibility of witnesses, without being preempted by the trial judge.⁶⁷

The Criminal Lawyers' Association takes a diametrically opposed position:

The alternative of excluding informer evidence from the trial record is an attractive one. Unfortunately, it must be conceded that the judicial response has not been enthusiastic. The case of *Buric* is perhaps the leading one in the area. There, Justice Labrosse reversed the decision of a trial judge holding that a Crown witness could not testify because his evidence was "manifestly unreliable". Justice Labrosse's reasons

⁶⁶ *R. v. Buric* (1996), 106 C.C.C. (3d) 97 at 111 and 113 (Ont. C.A.), aff'd (1997), 114 C.C.C. (3d) 95 (S.C.C.)

⁶⁷ See, for example, *R. v. Dikah and Naoufal*, (1994), 89 C.C.C. (3d) 321 (Ont.C.A.); aff'd 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*); *R. v. C.C.F.* (1998), 120 C.C.C. (3d) 225 (S.C.C.); *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.).

were affirmed upon appeal. It is not clear, however, just how far *Buric* goes. Both the majority and minority in the Court of Appeal held that the trial judge had misinterpreted the dissenting judgment in the Supreme Court's judgment in *Mezzo* and had mistakenly thought that the Supreme Court had endorsed exclusion of unreliable evidence. Justice Laskin in dissent in the Court of Appeal held that "manifest unreliability" went only to weight, not to admissibility.

The resolution of the *Buric* case was to no small extent coloured by the fact that without the witness in issue, the Crown could not prosecute the case. The exclusion of the witness would have the same practical effect as a stay of proceedings. Nonetheless, it will be next to impossible to get around the holding in *Buric* that even egregiously unreliable evidence is admissible.

One avenue is still available is that outlined by Justice Laskin in his *Buric* dissent. Where police conduct has undermined the trial process to the extent that the jury is unlikely to be able to fairly assess the credibility and reliability of a suspect witness, the trial judge is entitled to exclude the witness's evidence. The concept is called the "principle of protection" by Paccioco and applicable when even the evidence left to the trier of fact is not fairly assessable. The majority and Supreme Court of Canada decisions in *Buric*, although implicitly disagreeing with Justice Laskin on the fact of whether the evidence was possible to fairly evaluate, do not appear to disagree with the "principle of protection" espoused in his judgment. In fact, Justice Labrosse opined that if it was apparent during the witnesses' testimony that the trial was unfair, the "appropriate relief" — i.e. a stay or an exclusion of the evidence — would still be open to the trial judge.

This "principle of protection" approach seems particularly apposite to the case of jailhouse informants. Particularly if police directives or Crown Policy Guidelines are not adhered to, it may not be possible to exhume the informant's antecedents, motivations and dealings with the police and Crown. In such case, if it is not possible to put the full picture of the informant before the jury, his evidence ought not to be tendered at all.

The C.L.A. would support a legislative initiative giving trial judges the power, in the right circumstances, to exclude unreliable evidence. Despite our system being premised on the intelligence and good judgment of the jury, it is well accepted that there are types of evidence which, although relevant, are potentially so misleading and unreliable that the jury ought not to be permitted to rely upon them. (Footnotes omitted.)

I appreciate that our jurisprudence has generally favoured an approach that leaves the assessment of reliability to jurors and generally does not favour the assessment of reliability as a pre-condition to admissibility. However, I respectfully disagree with Mr. Butt that pre-vetting of jailhouse informant testimony based upon reliability ‘undermines democracy’ or the confidence shown in juries.

A *voir dire* which addresses reliability as a precondition to admissibility is far from a novel proposition. For example, it is now clear that the admissibility of hearsay evidence on a principled basis may involve an inquiry into the reliability of the proposed evidence (as well as considerations of necessity). In *R. v. Tat et al.*,⁶⁸ Doherty J.A. said this, in the context of hearsay evidence:

The reliability inquiry turns from a recognition of the dangers inherent in hearsay evidence to a search for indicia of reliability which provide a sufficient safeguard of the trustworthiness of the statement to overcome the concerns arising out of those dangers. Lamer C.J.C. and Iacobucci J., for the majority on this issue, put it this way in *R. v. Hawkins, supra*, at pp. 1083-84 S.C.R., pp. 157-58 C.C.C.:

The requirement of reliability will be satisfied where the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness. In particular, the circumstances must counteract the traditional evidentiary dangers associated with hearsay...

⁶⁸ (1997), 35 O.R. (3d) 641 (Ont. C.A.).

The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. *More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers.*

Similarly, the Supreme Court of Canada in *Mohan*,⁶⁹ and the Ontario Court of Appeal in *Terceira*,⁷⁰ both cited earlier in this Report, provide another analogy to the proposal here. These cases made clear that, where expert evidence which advances a novel scientific theory or technique is tendered for admission, the trial judge must assess, on a *voir dire*, the reliability of that expert evidence as a condition of its admissibility. Finlayson J.A. in *Terceira* emphasized that the trial judge determines *sufficient* reliability, not *ultimate* reliability.

It is my strongly held belief that the dangers associated with jailhouse informant evidence, together with its great potential to mislead, should make such evidence presumptively inadmissible. A trial judge should determine whether the evidence, together with the surrounding circumstances, meets a threshold of reliability *sufficient* to justify its reception as evidence. If admissible, the jury would determine the *ultimate* reliability of the evidence.

The appropriate burden of proof applicable on such a *voir dire* is equally debatable. Mr. Weinberg suggested that admissibility should be determined on a preponderance of evidence. Such a burden, which is synonymous with proof on a balance of probabilities is, of course, the burden which most frequently regulates the admissibility of evidence. However, we are concerned here with statements allegedly emanating from the accused,

⁶⁹ (1994), 89 C.C.C. (3d) 402 (S.C.C.).

⁷⁰ [1998] O.J. No. 428 (Ont. C.A.).

most frequently highly inculpatory. In Canada, the prosecution need establish the voluntariness of an accused's statements made to a person in authority beyond a reasonable doubt.⁷¹ In *Terceira*, Finlayson J.A. held that the reliability issue respecting novel scientific theory or technique relates strictly to a question of the admissibility of evidence where proof on a balance of probabilities is an acceptable standard. However, he goes on to say:

This is not an inculpatory statement made by an accused to a person in authority ... nor is it the establishment by the Crown of "facts which trigger a presumption with respect to a vital issue relating to guilt or innocence." (citations omitted)

He later returns to this topic:

The appellant relies upon the accepted onus on the Crown in determining the admissibility of confessions. The onus is described by Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at 359 as follows:

The present law in Canada and the U.K. is that the prosecution must prove voluntariness beyond a reasonable doubt. This view is based on the reasoning that since a confession is potentially determinative of the issue of guilt or innocence, the criminal standard of proof should be maintained.

The appellant also relies on *R. v. Egger*,⁷² a breathalyser case, where the Supreme Court of Canada held that the standard of proof for the service on the accused of a Certificate of Analysis and a Certificate of Qualified Technician within the times proscribed by the Criminal Code was to the criminal standard of beyond a reasonable doubt before the Crown could rely upon

⁷¹ I am aware that the Supreme Court of Canada is now being invited to consider whether the voluntariness *voir dire* should be extended to all statements emanating from the accused, whether or not made to a person in authority: *Michael Colin Hodgson v. The Queen*, Court File No. 25561, Supreme Court of Canada.

⁷² (1993), 21 C.R. (4th) 186 (S.C.C.).

the presumption in the certificate as to the blood-alcohol content of the accused's blood. However, this does not engage a question of the admissibility of evidence. As Sopinka J. stated at p. 202:

The issue here is very different from a question of admissibility of evidence. The effect of satisfying the burden of proving preliminary facts to the admissibility of evidence is only that the evidence is admitted: it determines neither the weight of the evidence nor the guilt of the accused. This occurs in the next step in the process during which the Crown must establish its legal burden. When admission of the evidence may itself have a conclusive effect with respect to guilt, the criminal standard is applied. This accounts for the application of this standard with respect to the admission of confessions (see *Ward v. R.*, [1979] 2 S.C.R. 30 at p. 40, per Spence J., for the Court, and *R. v. Rothman*, [1981] 1 S.C.R. 640, at pp. 670, 674-675, per Martland J., for the majority, and at p. 696, per Lamer J. (as he then was), concurring).

In my view, the jurisprudence supports, by analogy, the imposition of the burden of proof beyond a reasonable doubt to a *voir dire* into the admissibility of jailhouse informant evidence.

Recommendation 60: Crown education respecting informers.

The Ministry of the Attorney General should commit financial and human resources to ensure that prosecutors are fully educated and trained as to in-custody informers. Such educational programming should fully familiarize all Crown attorneys with the Crown policies respecting in-custody informers and appropriate methods of dealing with, and assessing the reliability of, such informers.

The Ontario Crown Attorneys' Association submitted that:

Crown counsel should be educated on the particular dangers associated with the use of in-custody

informants.

Crown counsel should receive instruction on the most effective means of evaluating the reliability of such evidence, including:

- the need to consider whether the in-custody informer has previously claimed to have received statements while in custody;
- the need to investigate any potential sources of media contamination from which an in-custody informant may have received information;
- the need to investigate an in-custody informant's opportunity to receive a statement from the accused;
- the need to investigate an in-custody informant's prior history, including his or her criminal record;
- the nature of any present or future benefit which is requested;
- the presence or absence of any evidence that would corroborate the particulars of a statement attributed to an accused by an informer.

I agree.

Recommendation 61: Police education respecting informers.

Adequate financial and human resources should be committed to ensure that Durham Regional police officers are fully educated and trained as to in-custody informers. The Ministry of the Solicitor General should liaise with other Ontario police services to ensure that similar education is provided to police forces which are likely to deal with in-custody informers. Such educational programming should fully familiarize all investigators with the police protocols respecting in-custody informers and appropriate methods of dealing with, and investigating the reliability of, such informers.

Jailhouse informants have shown ingenuity in accessing information

to enhance their testimony. Mr. Weinberg noted that informants can obtain information through “an ill-motivated questioner [or] just the inadvertent exchange of information which to an intelligent informant would give him some predicate for expanding his potential testimony.” Educational programming should ensure that investigators are mindful of this concern and conduct themselves accordingly.

Recommendation 62: Protocols respecting correctional records.

Provincial correctional facilities control various kinds of records which may become relevant to a criminal case. Different categories of records raise varying degrees of privacy or security issues. There appears to be no uniform and coherent policy respecting access to, or rights of inspection of, these records by police officers or defence representatives, the physical location of these records or the duration of their retention.

The Ministry of the Solicitor General and Correctional Services should establish protocols (which may be incorporated in whole or in part in legislative amendments) governing access to and retention of correctional records, potentially relevant to criminal cases.

Recommendation 63: Access by police officers to correctional facilities.

The Ministry of the Solicitor General and Correctional Services should ensure that a record is invariably kept of police (and other) attendances at any provincial correctional institute. The sensitivity of a particular attendance may affect what, if any, access is given to such a record, but that should not obviate the necessity for its invariable existence.

Recommendation 64: Placement of inmates.

An accused and another inmate should not be placed together to facilitate the collection of evidence against the accused, where that placement otherwise violates institutional placement policies. In other words, the police should not encourage correctional authorities to permit an inappropriate placement to facilitate the collection of evidence. Where a placement is requested, the request should be recorded, together with the reasons stated and the identity of the requesting party.

In Los Angeles, informants were placed with notorious accused and notorious accused placed with informants to facilitate the gathering of evidence. The grand jury was justifiably concerned about the classification of inmates in this way.

In the *Morin* case, Mr. May and Mr. Morin were placed together. Serious issues were raised at this Inquiry as to why they were initially placed together, given their circumstances. No satisfactory explanation was given by anyone for this placement. Nevertheless, the evidence did not permit me to find that the placement was done to facilitate the gathering of evidence.

Officers may have legitimate reasons for requesting a certain placement for an individual; indeed, they may be obligated to do so, where information in their possession bears upon the security of an inmate. Where a placement is requested, the request should be recorded, together with the reasons stated and the identity of the requesting party. This accords with the practice suggested by the Los Angeles grand jury.

Recommendation 65: Placement of witnesses.

Where inmates have already been identified as witnesses in a criminal case, they should be placed, wherever possible, so as to reduce the potential of inter-witness contamination. This generally means that prosecution jailhouse witnesses in the same case should not be placed together, where such separation is reasonably practicable.

This recommendation is intended to address ‘mutually reinforcing’ witnesses, another concern justifiably raised in Los Angeles.

Recommendation 66: Storage and security of defence papers.

The Ministry of the Solicitor General and Correctional Services should establish protocols to ensure that the accused’s legal papers can remain exclusively within his or her control in the correctional institution.

This recommendation is similar to that suggested by the Ontario Crown Attorneys’ Association and parallels a recommendation made by the Los Angeles grand jury. It addresses the misuse of disclosure briefs revealed by the evidence before the Los Angeles grand jury and the concerns

expressed there and here by defence counsel (and by Mr. Sheriff) as to the inhibiting effect upon the solicitor-client relationship created by unsecure defence materials within the institution.

The Ministry may be assisted by the protocol described by Mr. Baig in his testimony before me.

Recommendation 67: Timing and content of informer jury caution.

Where the evidence of an in-custody informer is tendered by the prosecution and its reliability is in issue, trial judges should consider cautioning the jury in terms stronger than those often contained in a *Vetrovec* warning, and to do so immediately before or after the evidence is tendered by the prosecution, as well as during the charge to the jury.

In *Vetrovec v. The Queen*,⁷³ the Supreme Court of Canada reflected that there is no automatic rule dictating when a trial judge must caution a jury about a potentially unreliable witness. A discretionary caution is frequently known as a *Vetrovec* warning.

The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury. In my view, the present law has developed to the point that a cautionary instruction is virtually mandated in cases where the in-custody informer's testimony is contested: see *R. v. Simmons*,⁷⁴ *R. v. Bevan*.⁷⁵ The content and timing of the caution is within the trial judge's discretion. Indeed, the Crown survey indicated that in 34 percent of the 41 cases where a warning was given, it was given both when the evidence was called and in the charge to the jury.

At Mr. Morin's second trial, the prosecution resisted a *Vetrovec*

⁷³ [1982] 1 S.C.R. 811 (S.C.C.).

⁷⁴ [1998] O.J. No. 152 (Ont.C.A.).

⁷⁵ (1993), 82 C.C.C.(3d) 310 (S.C.C.). In California, such an instruction is statutorily mandated: Penal Code section 1127a(b).

warning referable to Mr. May and Mr. X in the charge to the jury. Mr. Smith conceded that such a warning was warranted and that it would have been preferable had he not taken that position. In my view, if ever a warning was required, this was the case.

The trial judge did caution the jury. The caution may have survived appellate scrutiny. It is unnecessary for me to decide that. I am of the firm view, however, that a caution referable to contested jailhouse informant testimony must be given in the strongest terms. Like the traditional instruction for eyewitness identification, it should reflect that historically such evidence has produced miscarriages of justice. Such a caution can draw upon the dangers identified at this Inquiry and reflected in the language used in Recommendation 37 above.

I adopt Mr. Weinberg's evidence in this regard:

Telling the jury that this category of evidence has in the past resulted in unreliable verdicts is the best way of communicating to a jury that you need to be cautious. "It really drives home the fact that that category of evidence has put someone, or threatened to put someone in jail, who in fact was innocent, which is the ultimate horror of our criminal justice system."

Mr. Weinberg also believed that jury instructions given at the end of the case are extensive, and cautions as to jailhouse informants get lost. Where, as is the case for this category of witness, there is a history of unreliability or potential unreliability, the instructions should be given at the time just prior to the testimony, orally and in writing. The instructions can be repeated at the end of the case.

Frank Sundstedt agreed that the caution would be more meaningful if given immediately before or after the witness testifies.

I agree that trial judges should be encouraged to exercise their discretion through a caution given at the time the witness testifies. With respect, I do not agree with Mr. Wintory that such cautions amount to a "running commentary of really good and really bad evidence" and are inconsistent with the trial judge's role.

Recommendation 68: Crown videotaping of informers.

The Ministry of the Attorney General should amend its Crown Policy Manual to encourage all contacts between prosecutors and in-custody informers to be videotaped or, where that is not feasible, audiotaped.

In a later chapter, I reject the suggestion that all Crown attorneys' interviews with prospective witnesses be taped. It is impractical and unfairly inhibits trial preparation by Crown counsel. I should note that several of the Morin prosecutors supported such taping; however, I saw their support as a reaction to allegations made about how their untaped interviews with Morin witnesses were conducted, rather than a policy driven, well-thought out response.

Having said that, I am of the view that prosecutors should be encouraged (not mandated) to arrange for taping of interviews with witnesses who pose particular reliability concerns. Such taping not only enhances the ultimate fact-finding process through disclosure, but protects prosecutors from baseless allegations.

Recommendation 69: Informer as state agent.

Where an in-custody informer actively elicits a purported statement from an accused in contemplation that he or she will then offer himself or herself up as a witness in return for benefits, he or she should be treated as a state agent.

In California, a jailhouse informant acting as a state agent cannot actively elicit a statement from a detained accused. This conforms to Canadian law under section 7 of the *Charter*. So, where the police recruit an informant in their investigation against another inmate, the informant is deemed to be a state agent.

In many of the reported Los Angeles cases, the informants questioned their fellow inmates, with the expectation that they would then go to the authorities with a claimed confession (whether true or false) and barter for some benefits. In that case, the informant may not be a state agent. Mr. Sundstedt and Mr. Dalton could see no policy reason why such a person who actively elicits a statement, should not be treated as an *anticipatory* state

agent.⁷⁶ In other words, where an inmate actively elicits, with the expectation that he or she will offer himself up as an informant, it is arguable that the fruits of his or her efforts should be treated no differently than the treatment given to a conventional state agent. Of course, the countervailing argument is that the *Charter* is directed to government action; this informant's conduct does not attract *Charter* scrutiny.

The Criminal Lawyers' Association suggests the following analysis:

A presumption that a jailhouse informant is a state actor is not judicially available in Canada nor is such a presumption in accord with our traditions.⁷⁷ However, all is not lost in regulating the informant who has not previously been in contact with the police. Insufficient attention has been paid to the following passage from the majority judgment in *Broyles*:⁷⁸

I would add that there may be circumstances in which the authorities encourage informers to elicit statements without there being a pre-existing relationship between the authorities and individual informers. For example, the authorities may provide an incentive for the elicitation of incriminating statements by making it known that they will pay for such information or that they will charge the informer with a less serious offence. The question in such cases will be the same: would the exchange between the informer and the accused have taken place but for the inducements of the authorities? (Emphasis added.)

⁷⁶ This terminology was used instead of characterizing such a person as a state agent since the informant may do many things that, in law, should not be attributable to the authorities before they had any involvement, for instance, where the informant offers drugs to the accused as an inducement.

⁷⁷ *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.); *R. v. Broyles* (1991), 68 C.C.C.(3d) 308 (S.C.C.); see Clifford Zimmerman, "Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform" (1994) 22 *Hastings Constitutional L.Q.* 81 at 138-140.

⁷⁸ (1991), 68 C.C.C.(3d) 308 (S.C.C.).

Where the police or other authorities create an environment or a culture in which it becomes known that rewards will be provided to inmates who come forward with information incriminating other inmates, the inmate is properly classified as a police agent for the purpose of *Charter* analysis. The elicitation restriction originated in *Hebert* will be applicable. Certainly, this would seem to fit the situation which obtained in Los Angeles, where there was a pervasive culture which bred jailhouse informants. Counsel, propelled with broad disclosure concerning the recruitment of informants in the jurisdiction, should be encouraged to develop this line of authority.

I find that this approach has much to commend it. I also agree with Mr. Sundstedt and Mr. Dalton that there are sound policy reasons to treat witnesses who elicit, with the expectation that they will thereby become informants, as state agents. Such an approach is less likely to promote an environment such as that which existed in Los Angeles. However, we should be under no illusion. It does not follow that such informants will respect these limits (or admit that they exceeded them). As the grand jury report noted:

No informant testified that he was cautioned not to directly or deliberately elicit information from the targeted defendant. Assuming that law enforcement officials did admonish an informant not to directly elicit evidence from another inmate, informants are unlikely to heed the instruction. The widespread belief held by informants that law enforcement officials solicit fabricated testimony would tend to negate the effect of any such admonishment. Furthermore, the favourable treatment informants expect for obtaining information is an overwhelming incentive to disregard such an instruction. The willingness of many informants to perjure themselves, and otherwise lie, will prevent these informants from acknowledging their roles in eliciting information from a defendant.

IV

The Investigation by the York Regional Police

A. Introduction

As noted in Chapter I, Queensville is a small village located at the intersection of Queensville Sideroad, which runs east and west, and Leslie Street, which runs north and south, within the jurisdiction of the York Regional Police force. While today the jurisdiction of this police force encompasses an area which has a population of approximately 680,000, on October 3, 1984 it was estimated that the population was 240,000. At that time, the York Regional Police force did not have a designated homicide squad or even a major crime unit; there was a ratio of approximately one officer for every 860 residents.

In October 1984, York Region was split into divisions. Nineteen Division (now 1 District) encompassed the area south of Queensville Sideroad and included the Towns of Newmarket, Aurora, King City, King Township, Stouffville, and Musselman Lake. The jurisdiction of 39 Division (now 3 District) extended to those areas north of the Queensville Sideroad, which were less heavily populated, and included the towns of Queensville, Keswick, Sutton, Jackson's Point, Pefferlaw and part of Port Bolster. York Region extends from the northern extremity of Toronto to Lake Simcoe, bordered by Peel Region to the west and Durham Region to the east.

This chapter examines the investigation by the York Regional Police force into Christine Jessop's disappearance. This investigation was turned over to the Durham Regional Police Service upon the discovery of Christine Jessop's body on December 31, 1984.

Two York Regional officers, Constables Rick McGowan and David Neil Robertson, became contentious witnesses for the prosecution at Guy Paul Morin's second trial. This chapter briefly introduces these officers in the context of their involvement in the York Regional investigation. An examination of the role they played in Mr. Morin's prosecution is dealt with in a subsequent chapter.

B. The Missing Person Investigation

(i) The Early Response to Christine Jessop's Disappearance

Upon arriving home from Newmarket on October 3, 1984, Ken and Janet Jessop noticed that Christine had already been home. Her school bag was on the pantry counter and the mail and newspapers had been taken inside the home, as was Christine's usual routine when she got off the school bus. Janet Jessop relaxed briefly, telephoned her husband's lawyer, and then drove to the park to look for Christine. She stopped at the variety store, and also looked for her daughter in the cemetery behind their home where Christine would often play. Ms. Jessop then returned home and made dinner. When Christine had not returned home by early evening, she telephoned the York Regional Police.

Over the next seven hours, approximately 13 police cars, two emergency vehicles and 17 police officers were dispatched to the Jessop residence to assist with the missing person investigation. Fifteen to 20 civilians (notified either by Ms. Jessop or her neighbours that Christine was missing) arrived at the Jessop home that evening to assist in the search for the missing child.

Constable McGowan was the first officer to attend the Jessop residence. He obtained information regarding Christine's description and details relating to her disappearance. There was some discussion as to whether she could have gone to a friend's house or to her grandmother's house which was out of the immediate area. Friends and family of Christine to whom Janet Jessop had not yet spoken were contacted.

Constable McGowan asked the friends and neighbours who began arriving at the Jessop home to lend their assistance by checking the park,

conducting a door-to-door search, or contacting Christine's friends to see if anyone had seen her. He also searched the Jessop premises just in case Christine was simply hiding in the house, as children are sometimes prone to do. As the evening progressed, more officers arrived. Constable McGowan claimed, in testimony given at Guy Paul Morin's second trial, that at approximately 8:30 p.m. he went next door to the Morin house. He knocked at the front door and had a brief conversation, while standing on the Morin porch, regarding Christine's whereabouts. This attendance, together with his alleged observations of Guy Paul Morin at that time, is discussed in some detail later in this Report.

A large truck with very bright spotlights was requested to assist with the search. McGowan asked that a zone alert, outlining the details pertaining to the missing girl, be issued to the other police forces. This alert, which provided a description of the clothing that Christine was last seen wearing and her general physical appearance was issued to the Greater Toronto Area, extending to Hamilton, Durham, Peel, and cities to the north of York Region.

The Jessop home was searched several more times that evening by various police officers. Family members and friends were free to come and go throughout the home.

Inspector Robert Wilson (now Deputy Chief) was called to the Jessop household in the early hours of October 4th. At 1:00 a.m., he attended as the officer in charge of this missing person investigation, and he remained the officer in charge until the investigation was turned over to the Durham Regional Police on December 31, 1984.

Soon after his arrival, Inspector Wilson gave his permission for one of the officers to use his dog as an aid in the search for Christine. Accordingly, Constable Robertson brought his dog, Ryder, to the scene. Inspector Wilson heard nothing about Constable Robertson's dog reacting in any way when it was in the vicinity of the Morin family Honda. In fact, it was not until 1990 that Constable Robertson and his dog became a component of the prosecution's case against Guy Paul Morin. Robertson's involvement is fully canvassed in a later chapter.

Inspector Wilson directed a staff sergeant to take a formal statement from Ken Jessop. At approximately 2:00 a.m. on October 4th, Sergeant Rick McCabe awakened Christine's brother and provided him with some paper in

one of the upstairs bedrooms. He instructed him to write out his recollection of the occurrences and timing of events that day. Ken Jessop was not questioned about any ambiguities or details contained in this statement. This signed statement, which was subsequently lost, was incorporated into a supplementary report. Constable Raymond Bunce (now Sergeant) testified that the informal way in which this statement was taken was in keeping with a missing person investigation, but not with a serious criminal investigation. The extent to which officers conducting a missing person investigation should be mindful of its potential for escalation is a recurring theme of interest in this chapter.

Upon learning from one of his officers that Janet Jessop seemed to be extremely calm under the circumstances, Inspector Wilson warned her that she could be charged with public mischief if she knew where her daughter was or was withholding information. Because Bob Jessop, her husband, was then in jail, some officers thought that Christine Jessop's disappearance could be a ruse to secure his early release. Accordingly, the family's involvement in Christine's disappearance was considered and their actions carefully scrutinized during the initial stages of the investigation.

(ii) Treatment of the Jessop Residence

Christine Jessop was a child of tender years when she disappeared. Her bicycle was lying on its side in the shed, as opposed to the upright position in which she generally kept it. Its kickstand and carrier appeared to be damaged. Her pink jacket, which the Jessops believed she had been wearing that day, was hanging on a hook that was beyond Christine's reach when the Jessops returned home that afternoon.

The Jessop home, however, was not treated as a prospective crime scene. No effort was made during the various searches of the premises to preserve evidence or protect the home from the contamination by those present; no attempt was made to preclude persons from entering certain parts of the house. Indeed, as I have earlier noted, throughout the evening numerous police officers and civilians moved freely inside and outside of the residence.

When Constable McGowan first arrived at the scene, he had noted the placement and condition of Christine's bicycle on the floor of the shed. When another officer arrived at the Jessop household at 8:55 that evening,

Christine's bike was already leaning against the wall of the shed. Inspector Wilson hypothesized that one of the civilian searchers may have moved the bicycle. Clearly, no care had been taken at that time to preserve any fingerprints on the bicycle or maintain the bicycle's location.

Constable McGowan also had noted the location of Christine's pink jacket when he arrived at the Jessop residence; however, when Constable Bunce attended the Jessop household, he observed that the jacket was lying on a table in the hallway. No one could say why the jacket had been moved. Janet Jessop thought an officer had moved it from its hook.

Detective Eric Strong, an identification officer, arrived at 11:55 p.m. to fingerprint the bicycle and to reproduce some photographs of Christine for distribution to the community. He did not attempt to 'dust' the home (and, more particularly, Christine's room) or things that she might have touched, either to preserve her fingerprints or determine if foreign fingerprints were present. This is probably attributable to the status of the investigation at that time. However, the house was not fingerprinted even in the ensuing weeks following Christine's disappearance, despite the growing concerns about her fate. Photographs which the identification officer did take of the bicycle were not even developed until the late 1980s.

(iii) The Later Discovery of the Recorder Fingerprint

It is necessary here to briefly jump forward in time.

After Christine Jessop's remains had been found, a partial fingerprint was purportedly found on her recorder by Sergeant Michael Michalowsky of the Durham Regional Police Service. In an effort to determine if the partial print was that of the child or, possibly, of her abductor, Michalowsky went to the Jessop home on January 8, 1985, in an attempt to lift fingerprints in her room. Because of the passage of time since Christine's disappearance and the adverse effect the room's heat had on the life expectancy of latent fingerprint and palm impressions, Sergeant Michalowsky was only able to lift four very poor partial finger impressions and one partial palm impression (which he later described as "exceptionally good") off of the side of a corner cabinet. He also took photographs on that occasion.

In a January 10, 1985 supplementary report, Sergeant Michalowsky documented his request that York Regional Police obtain the prints of their

officers for comparison and elimination purposes. He was told by Inspector Wilson that the York Regional officers did not touch any of the furniture in the bedroom and, as a result, prints of York Regional personnel could not usefully be compared with the unidentified palm impression. Sergeant Michalowsky noted this in his report:

As a result, their [York Regional] personnel can not be, compared against the unidentified partial palm Impression, since no Elimination Fgpts/Palms are forthcoming.

This branch shall be obliged to await the tendering of 'suspect' or other palm impression for comparison purpose.

Inspector Wilson conceded at the Inquiry that the initial searches of the Jessop household that evening may have involved officers looking under the bed, opening closet doors and large dresser drawers in their efforts to ensure that the child was not hiding in the home. It was, therefore, quite possible that one of his officers had left behind a palm impression or a fingerprint. His comment to Sergeant Michalowsky was based on information from his identification officer that *he* had not entered Christine's bedroom. Inspector Wilson failed to consider that other officers may have touched items in the bedroom during their searches when he spoke to Sergeant Michalowsky.

Had fingerprints been lifted in a timely manner from Christine's personal possessions and her room, they may have been utilized to determine whether the partial fingerprint on the recorder could have been Christine's. As it turned out, the Crown at the first trial was permitted to tender evidence, through Sergeant Michalowsky, that the partial fingerprint did not exclude Guy Paul Morin as the perpetrator (though a positive identification could not be made due to the limited comparison available.) The value of even this limited evidence was later discredited. More about this later.

(iv) Organized Searches

During the evening of October 3rd, and in the days which followed, police organized searches of the area, and many citizens attended and helped. It was estimated that, on the first evening alone, 50 to 70 persons assisted in

the search. Whatever the deficiencies in the search, police and civilian participants spared no effort and showed great dedication in this task.

By the early hours of October 4th, a mobile home was set up as a command post at the fire hall on the north side of Queensville Sideroad, east of Leslie Street. This central command area was the focal point where the York Regional Police organized their search for Christine Jessop. It was equipped with a phone line to enable immediate access to any tips, and with typewriters which the officers used in preparing their supplementary reports.

In the days following the disappearance of Christine, citizens arrived at the command post, signed a sheet and then were divided into search groups. Police officers were assigned to specific groups of civilians who then boarded a bus and were taken to designated search areas. They combed through the hilly terrain, ponds, marshes, farmers' fields and bush area looking for the missing child. Police divers searched ponds in the area in the event that Christine had fallen into a pool of water and drowned.

A map of the Queensville area at the command post contained marked-off sections representing the areas that had been searched. These searches were conducted somewhat informally, in that an officer in charge of a search group would come back and verbally report and mark off an area once his or her group had completed its search. No written records were maintained documenting the participants in each group, or the time and location of each group's search.

The organized searches of the surrounding Queensville area concluded on the weekend of October 7th. By that date, the York Regional Police had ruled out that Christine was with family, had gotten lost or had injured herself in the local fields or ravines.

(v) Door-to-Door Canvass of Queensville

The York Regional protocol for missing persons mandated that a house-to-house search be conducted. A search or, in the least, a comprehensive canvass (interview) of every household in Queensville to obtain *and record* detailed information while everything was fresh in the residents' minds would have been of assistance to the subsequent investigation. It ultimately may have been of assistance to Guy Paul Morin as well in memorializing his activities on October 3, 1984 in a timely fashion.

In 1984, Queensville had a population of approximately 700. Inspector Wilson testified that it was not practical to conduct a house-to-house search of every home. The protocol was interpreted to require a search of only the block or half-block within the immediate area of the child's disappearance. The York Regional records do reflect, however, that the entire town was 'canvassed.'

The adequacy of the neighbourhood canvass that York Regional Police performed was the subject of comment by Inspector John Shephard of the Durham Regional Police during the stay motion that preceded the second trial. He testified that while York Regional Police interviewed certain people, it did not do a comprehensive canvass to obtain the necessary information. Inspector Wilson was unable to comment upon the veracity of this statement. He conceded that there had been no canvass sheets completed outlining the people who were present in each home on October 3rd, pinning down their activities, documenting their whereabouts, recording a full description of their vehicles and whether they had seen or noticed anything suspicious. Constable Bunce, later assigned to assist the Durham investigation, confirmed that a door-to-door canvass was done more thoroughly by the Durham Regional officers than by York Regional officers. Unfortunately, this was several months after the disappearance of Christine Jessop when memories had inevitably faded and the trail had grown colder.

(vi) The Evolution of the Investigation

Officially, the York Regional investigation remained a missing person investigation throughout. There is no doubt, however, that, at some point, investigators began to think of it more as an investigation into a serious crime. Testimony varied as to when this change took place. Some stated that the concerns "heightened" the first weekend after Christine's disappearance, after a large search revealed nothing. Others said that it was not until "several weeks down the road" that there was a belief that something extremely serious must have happened. Detective Sergeant John Nechay testified:

[A]fter the search, we knew that something had happened. She wasn't in the general area of Queensville, so, we looked at it more seriously, and then, honestly, in the back of our minds, we knew that something had happened, but what, we didn't know.

As concern heightened, York Regional officers were left with the possibility that this disappearance might involve an abduction, sexual assault, or murder. Detective Sergeant Nechay testified that this possibility would trigger the application and infusion of more resources into the investigation, but he was unable to recall if more officers were, indeed, provided.

Inspector Wilson told the Inquiry that a week or two after Christine disappeared, he knew that there was a likelihood of foul play and that the investigation should be stepped up. While there was no formal acknowledgment that they were now investigating a major crime, as time progressed many of the experienced officers felt that the likelihood of finding Christine alive was slim; even if she was not abducted, hunger and exposure to the elements would have diminished her chance for survival.

Inspector Wilson did reflect that, although there was a period of time where “perhaps you didn’t want to admit it to yourself that Christine ... was in some very serious [trouble],” he felt that the investigation nonetheless involved work by the Criminal Investigation Branch within 24 hours looking into, for example, potential sexual offenders.

The investigation itself took three basic avenues: the first was an evaluation of the Jessop family members as possible suspects. Next was the investigation of potential sex offenders known in the area. The third was the investigation and follow-up of tips from the public. From October to December 1984, York Regional Police force’s attempts to find Christine also included numerous public appeals by way of press conferences, television broadcasts and newspaper articles.

(vii) Findings

The assessment whether a missing person investigation should be converted into a serious crime investigation, with all that the latter entails, depends on the circumstances of each case. Inspector Wilson told the Inquiry that had the situation been considered more seriously as a potential homicide or major crime at the outset, the Jessop residence would have been secured in order to preserve potential evidence. The household would have been fingerprinted and photographed, and timely, detailed and comprehensive witness statements would have been taken from all individuals. Fingerprints and hair samples would have been obtained, which would have avoided the later difficulty that officers encountered once Christine’s body was found.

I understand fully why the York Regional officers treated the situation as a missing person investigation. Queensville (and indeed York Region) was then relatively free of major crime. There had been no previous instance of a child abduction and murder. I am told that there has not been another instance in York Region of a youth being abducted and murdered in the subsequent years.¹ The York Regional Police force received many missing persons reports. Indeed, at present, they receive over 800 missing persons reports every year, about 10 per week involving "youths under the age of majority." Every missing person investigation cannot be elevated into a full fledged criminal investigation and every home into a crime scene. Further, the Jessop residence did not clearly indicate that a crime had been committed. For example, there were no signs of forced entry. Ms. Jessop's suspicions were certainly not aroused immediately upon her arrival home.

Having said that, I must nevertheless note that there were circumstances that should have excited suspicion in the mind of a trained investigator that an abduction (though not necessarily a homicide) had occurred. Christine was young. There was no apparent history of a family dispute or turmoil which would explain her voluntary departure that day. There was no suggestion of any difficulty at school. There was no apparent trace of her in a relatively small community. The positioning and damage to the bicycle and the location of her jacket possibly suggested an encounter with an older person.

In my view, the problem here was not that the police characterized their initial involvement as a missing person investigation. The problem was that the officers did not conduct themselves mindful of the *possibility* that they were dealing with a serious crime. As a result, opportunities were missed that ultimately affected the quality and effectiveness of the criminal investigation. Some officers appeared to have a prevailing hope, long after the exhaustive search, that Christine would be found alive. This hope or optimism may have precluded a more detailed and focused investigation.

Any canvassing that was done of the estimated 200 homes was not an in-depth canvass and, in the circumstances, should have been done early in the investigation. Note-taking of interviews was often inadequate. Again, it

¹ There has been one other missing person investigation that ultimately did become a homicide.

is prudent in any missing person inquiry which might conceivably become a major crime investigation to meticulously document and clarify the memories of all prospective witnesses at the earliest opportunity.

The organization and documentation of the civilian searches may not have been perfect. However, the searches were wide-ranging and civilians and police were well mobilized in the circumstances. This aspect of the investigation was largely commendable, particularly given the absence of any prior experience by York Regional Police in conducting such a search.

The York Regional Police Services Board and the York Regional Police Association have recommended certain changes to address how missing person investigations should be conducted where there is a possibility that a serious crime has been committed. The York Regional policies have already been improved to address this very issue. My later recommendations draw upon much that these parties have submitted to the Commission.

C. The Organization and Conduct of the Investigation

(i) Supplementary Reports and Follow-up

Following the disappearance of Christine Jessop, an 'original occurrence report' was prepared, outlining the initial information about her disappearance. After that, supplementary reports were filled out by officers who had been given specific assignments. These were typed or handwritten by the officers and they outlined what investigations were conducted. All supplementary reports referred back to the number on the original missing person occurrence report.

The supplementary report forms utilized by the York Regional Police force were standard police forms. On each form were various boxes to identify the author of the report, the date, the officers involved in obtaining and verifying the information in the report, and the further investigation that was necessary. Inspector Wilson stated that for the most part, these boxes, which were designed to assist in the tracking and follow-up of the investigation, were not utilized by the officers. Various aspects of the investigation into Christine Jessop's disappearance were not even recorded in supplementary reports or in officers' notebooks.

Supplementary reports were filled out in quadruplicate and were left at the command post for filing during the initial stages of the investigation. Later, when the command post was abandoned, the reports were left at the Criminal Investigation Branch office at 19 Division in Aurora. One copy was filed with the records investigation branch. On the second copy, Detective Bunce or Inspector Wilson would usually make a notation as to whether a follow-up was necessary, and they would retain this copy until the follow-up was completed. As the investigation progressed, Bunce did not get reports back as quickly as he desired. Only then did he begin to write the name of the officer responsible for follow-up on the bottom right-hand corner of the report. (He was unable to say when this change was effected.) A third copy went into the binder that was kept with Detective Bunce at the command post. The fourth copy was a working copy provided to the officer doing the actual follow-up.

A number of failings were associated with the use of these supplementary reports and the follow-up to leads or tips. First, the system for keeping track of which officers were assigned to do what and whether or not they had completed those tasks, was inadequate. Second, there was no real system in place to ensure that work assigned was followed up by officers in a timely fashion. Third, there was no real system in place to prioritize the work that officers were directed to do. As I reflect below, this resulted, at times, in priority being given to improbable leads or tips, and no priority given to important leads. Fourth, there was no adequate system in place to ensure that officers were briefed on the status of the investigation, including what other officers had done. There were no regular, formal meetings of investigators, and while there were briefings, there was no procedure in place to ensure that all officers involved in taking tips and checking out leads were present or otherwise informed of all of the matters discussed at the briefings. There was no adequate system to ensure that all reports were read and processed in a timely way. Inspector Wilson, in charge of reading the reports, said he 'attempted' to read them all. Accordingly, the potential for leads and follow-ups to slip through the cracks was present and, unfortunately, this occurred.

Staff Sergeant Ken Paton, testified at the pre-trial motions that the practice in relation to this investigation was to make notes on pieces of paper instead of recording them in a notebook. After making these notes, the sheets of paper were then turned into supplementary reports. He stated that he had been instructed to do so by Inspector Wilson, but Wilson denied giving such

a direction; no other officers who testified at the Inquiry could recall receiving such instructions.

(ii) Indexing System

The supplementary reports were filed numerically and chronologically. Constable Bunce, who had no previous experience in indexing and maintaining a system for supplementary reports, was given primary responsibility for the maintenance and organization of these records. Bunce testified, however, that he did not initiate the actual system, but simply took instructions from Inspector Barry Delaney as to how the system should be organized.

Supplementary reports were placed into an 'in' tray. The officer would review them, number them, index them and send the various copies out to the respective areas for filing and follow-up.

Reports would be indexed and filed alphabetically under the author's name and under the names of anyone mentioned in the report. There was no index based upon relevant subject matter. *As a result, the indexing system did not permit an officer to search, for example, for all apparent sightings of Christine Jessop, or vehicle sightings, without having the actual name of the author of each report or the name of each person who claimed to have made the sighting. This indexing system was archaic by today's standards, but even in terms of the standards of the day, the system could have been improved by having a manual index of important subject matters contained in the supplementary reports.*

(iii) The Pursuit of 'Hot Leads'

During the first few days of this investigation, there was no one specifically in charge of reviewing tips received from the public to ensure that the 'hottest' leads were followed up on a priority basis. Supplementary reports documenting these leads were put in a holding box for review by officers at a later time. This was particularly unfortunate as the 'hottest' leads are often provided early after a disappearance. Inspector Wilson now recognizes the failure to systematically prioritize and follow up on those leads.

The York Regional Police force protocol for missing persons — a document designed to guide officers in their investigations — includes the requirement that the last individual to see a missing person must be interviewed.² York Regional Police may have missed an opportunity to do that on a timely basis, given the failings of the investigation. Some examples of the failure to pursue important leads in a timely and effective way are outlined below.

The Horwoods

On October 6, 1984 at 1:00 a.m., an officer of the York Regional Police force received a telephone call from a woman stating that she and her husband had observed a suspicious occurrence. At approximately 4:00 p.m. on October 3rd, Ms. Horwood and her husband saw a male person in a very dirty dark green or blue Buick near the Queensville feed mill. While waiting at an intersection, the Horwoods observed this Buick which was stopped at the intersection facing them. It had been traveling eastbound on the Queensville Sideroad and was waiting for traffic to clear so that it could proceed northbound on Leslie Street. Both Mr. and Ms. Horwood noticed that the male driver appeared to be holding a small child in a forceful manner in the front seat area. They were unable to obtain a licence plate number. A supplementary report was filed by the officer who took this information.

A notation written directly on the supplementary report that this information should be “followed up.” *Despite this fact, it was not until October 18th, some 12 days later, that a follow-up was done by Sergeant Venables.* On that date, Ms. Horwood was personally interviewed for the first time about this sighting. She told the officers that the male driver was slouched down in his seat and appeared to be holding a child with long dark hair in a very forceful manner close to his chest with his right arm, and was driving with his left hand. The Horwoods followed this Buick as it proceeded north on Leslie. The car turned west onto Fieldstone Lane in the Balmoral Heights subdivision. It drove up this street very slowly and close to the curb. The Horwoods were so concerned over what they had seen that they, too, turned into the subdivision and drove slowly around the block looking for the Buick. Unfortunately, by the time they turned into the subdivision they had

² This same protocol now includes the requirement to obtain a statement from this individual, and not just interview them.

lost sight of the car and did not see it again. Ms. Horwood estimated that they first observed this vehicle at approximately 4:05 p.m. They described the driver as male, dark-skinned, mid-forties, stocky with dark hair and grubby in appearance.

On October 21, 1984, three days after this initial interview and 15 days after the original phone report by Ms. Horwood, Mr. Horwood was interviewed for the first time. He was able to provide even more precise information relating to the description of this vehicle. At this time, he stated that the vehicle was “*exactly* like the Buick parked in the driveway of a residence” located nearby, except that the colour had been different. Therefore, the police were provided with very specific information relating to this car — a precise model and year of the two-door Buick Park Avenue. There was no follow-up with the Ministry of Transportation. For example, the Ministry was not asked to provide a print-out of all 1979 Buick vehicles in the area, or the driver's licences or vehicle registrations for all individuals in the area with a similar car in terms of year and colour. It was stated “to be a very large task.” No canvass of the residents of Fieldstone Lane or the Queensville area was conducted to determine if anyone knew or saw someone answering the description of the vehicle or persons observed by the Horwoods. Nor could anyone recall giving instructions to the officers to canvass the Queensville area to look for a vehicle of comparable colour and model.

Unfortunately, by the time Mr. and Ms. Horwood were personally interviewed, they were unsure whether they had observed this vehicle on Tuesday, October 2nd or Wednesday, October 3rd. While they recounted the events clearly, they could no longer pinpoint the day of this occurrence.

This was a strong lead. Despite the fact that the Horwoods offered to undergo hypnosis, this was neither followed up nor authorized by the police. Hypnosis had been undergone by some witnesses, such as Yvette Devine, Guy Paul Morin's sister, who had seen a suspicious car in the driveway at the Jessop residence on the day of Christine's disappearance, in order to help her recall details of the licence plate. No witnesses were able to explain why Mr. and Ms. Horwood's sighting had not been followed up on a timely basis and why hypnosis was not undertaken.

During the Inquiry, York Regional officers conceded that the time between the original tip and the actual follow-up did not look like good

police work and was “pretty lax.” Detective Sergeant Nechay stated in this regard:

The resources concerning personnel were limited. We had officers following up information obtained as quickly as possible. That's all I can say about that. If we had more men, certainly we would be going to follow ups a lot quicker.

Newspaper Delivery Person

A newspaper delivery person had delivered a newspaper to the Jessop household on the afternoon of October 3, 1984. In fact, when Ken and Janet Jessop returned home from the dentist, they knew that Christine had already been home as the newspaper had been taken into their home, presumably by Christine. These newspapers were usually delivered around the time Christine got off the school bus, and it was her job to ensure that they were picked up off the lawn and brought into the house. No one fingerprinted the blue plastic wrapper of the newspaper. By the time York Regional officers thought about this possibility, it had long since been discarded.

At the time, it should have been obvious that the newspaper delivery person may have been one of the last people to have seen Christine Jessop alive (other than the perpetrator of the crime) and may have had some useful information.

Ken Jessop provided the name of the newspaper person, his address and his phone number on October 10, 1985 to York Regional police. One of the supplementary reports prepared by York Regional Detective Brian Abraham noted that further follow-up with respect to paper delivery “is imperative.” Regrettably, this lead was never followed up. Inspector Wilson testified that this might have been pretty crucial information. It is another example of a follow-up slipping through the cracks.

Mr. T.

The Chief of the Bradford Police Department, John Harrison, was concerned enough to contact Inspector Wilson suggesting that “Mr. T”³ be

³ This person's name was not used during the Inquiry.

considered a serious suspect in relation to Christine Jessop's disappearance. He was described as a young person with a criminal record involving sexual offences against young children, was known to carry a buck-knife, and had worked behind the Jessops' home in the cemetery — a location where Christine Jessop played regularly — as late as July 1984.

The whereabouts of Mr. T. were investigated by York Regional Police. He was quickly 'cleared,' apparently on the basis of information provided by family members who established an alibi for him. When, some years later, an attempt was made to verify this alibi, it was discovered to have been false.

The investigation of this lead was, in my view, less than adequate. I should note that this example is not intended to suggest, in any way, that Mr. T. was responsible for Christine Jessop's disappearance. In my view, a number of individuals were inadequately cleared during the Durham Regional investigation as well — though they have undoubtedly been properly cleared by now.

Low Priority Leads

Numerous reports of sightings of Christine Jessop soon after her disappearance were filed. A number of these reports were of questionable assistance. Many psychics offered their services. One stated that Christine Jessop would be found in a certain body of water. Despite the fact that this body of water had already been searched by police divers, it was searched again. An individual using a dowser or a divining-rod was brought in after one tip.

(iii) The Community Profile

Detective Sergeant Nechay testified at the stay motion that York Regional's position was that every person in the area was basically a suspect until cleared by the investigation. Indeed, Inspector Wilson testified at the Inquiry that this was the public position taken by the York Regional Police. Polygraph tests were administered to some.

However, no efforts were made during the investigation to 'profile the community' by way of an analysis of tax rolls, voting lists, lists of non-

resident workers at construction sites, or driver's licence or vehicle searches for the area. Resort to this kind of documentation could enable police to obtain a 'snapshot' of the individuals residing in the Queensville area from October to December 1984. York Regional Police force did not review occurrence reports for the Queensville area for the years prior to October 1984 to determine what crimes or complaints of crimes had been reported. Detective Sergeant Nechay testified that this is something that would now be done if a serious crime was being investigated. York Region officers did, however, obtain a list of possible sexual offenders, as well as persons associated with pornographic material through the O.P.P.'s Project P.

(iv) The Time that Janet and Ken Jessop Returned Home

Overview

The time that Janet and Ken Jessop returned home on October 3, 1984 was significant, since it helped to determine the time of Christine's abduction. This time gained added importance once Guy Paul Morin became a suspect in 1985. This section of the Report examines some aspects of the way in which York Regional police investigated this issue. The various interviews with Janet and Ken Jessop relating to timing, both by York Regional and by Durham Regional officers are noted in a later chapter, in the context of the way in which Durham officers and prosecutors dealt with the timing issue generally.

The Timing Run

On October 9, 1984, York Regional officers performed a 'timing run' in relation to Ms. Jessop's reported activities on October 3rd. Detective Sergeant Nechay and Inspector Kerrigan accompanied Ms. Jessop as she retraced her steps for that afternoon: attending at Dr. Taylor's dental office on Eagle Street in Newmarket to drop her son off, parking in front of the Toronto-Dominion Bank, walking to the Bell Telephone office, then to Household Finance and to Municipal Savings and Loan, picking up her son at Dr. Taylor's office, and returning home. According to this timing run, these activities took approximately 36 minutes from the time she dropped Ken off to their arrival home.

Bell Telephone

As part of Ms. Jessop's narrative, she stated that she paid a bill at the Bell Telephone office located on Main Street in Newmarket.

On October 4, 1984, Lois Gibson, a clerk in that office, was contacted by Inspector Wilson to confirm if and when Ms. Jessop attended the office the day before. Ms. Gibson said that Ms. Jessop was there around 4:30 that afternoon. After this conversation, she began to wonder whether she was correct. As she had the impression that this was important, she called the main office in Toronto (which had a record of the date and time of every transaction) to see what time Ms. Jessop had paid her bill. A service representative provided this information to Ms. Gibson, who realized she had been wrong in her 4:30 estimate. Accordingly, on October 5th, she telephoned York Regional Police and asked to speak with the Inspector. As he was not available, Ms. Gibson left the correct time with a secretary at the station. She told the secretary it was very important that this information be given to Inspector Wilson. Her message was misplaced and Inspector Wilson never received it.

Over five years later, in 1990, this came to light. As part of defence counsel's investigation into the timing of Ms. Jessop's activities, Ms. Gibson was contacted. She described her telephone call to Inspector Wilson's secretary. She had presumed that Wilson had received her message. By this time, the Bell records were no longer available; however, Ms. Gibson provided an Affidavit to the defence in March 1990 stating that, as best as she could remember, the business office had told her that Ms. Jessop had paid her bill on October 3, 1984 between 3:30 and 3:45 p.m. The original records would have been valuable in establishing the precise time that Ms. Jessop attended at Bell Telephone. No written record was ever located of Ms. Gibson's message to Inspector Wilson containing the correct time. Inspector Wilson never recorded his original conversation with Ms. Gibson in a notebook or in a supplementary report. The York Regional police did not inquire whether Bell Telephone records could speak to the issue of timing.

Household Finance

Ms. Jessop's narrative also involved a visit to Household Finance. Pamela Watson, who worked there on October 3, 1984, recalled Ms. Jessop's

attendance. Ms. Watson testified, as a witness for the defence at the pre-trial motions, that Ms. Jessop glanced at the time and commented that she had to pick up her child at the dentist's office. Ms. Watson was interviewed by two York Regional Police officers within a few days of Christine's disappearance. Unfortunately, no specific notes or supplementary report were prepared outlining the conversation with Ms. Watson. By the time defence counsel's investigator tracked down Ms. Watson in 1990, the records of Ms. Jessop's attendance had been destroyed. Ms. Watson's best estimate, some five and a half years after the event, was that Ms. Jessop had attended the office between 3:40 and 4:00 o'clock that afternoon. Ms. Watson swore an Affidavit to this effect on March 29, 1990.

This represented a second lost opportunity to precisely ascertain the timing of Ms. Jessop's activities on the afternoon of October 4th. By the time these witnesses were examined in May 1990, their recollections were open to challenge as there was no longer any available contemporaneous record of what had transpired over five years earlier. When Ms. Watson testified that Ms. Jessop's visit was sometime between 3:40 and 4:00, she was questioned by the Crown as to the veracity of her memory. When asked "Is there some reason why it couldn't have been 4:10 or 4:15?", she answered candidly "Not really." Had York Regional Police recorded the statements from these witnesses in a timely fashion, this problem might not have arisen.

(v) Guy Paul Morin

I have already noted that no formal statements were taken from the residents of the Queensville area. In particular, no statement was taken from Guy Paul Morin during the months following Christine Jessop's disappearance.⁴ There was, however, a supplementary report prepared by Detective Sergeant Nechay following some information he received from the previous owners of the Jessop residence on November 2, 1984. The first page of this supplementary report states:

[T]heir son Paul acts weird, however, she would not say in what way this person acted and suggested that we speak to the second house north of the Jessop's, and

⁴ At trial, Guy Paul Morin testified that he had indicated to the York Regional Police where he had been that day and when he came home. This evidence was contested by the prosecution at trial.

these people would be able to supply further information.

In Detective Sergeant Nechay's notebook on this date is a notation that this “[s]hould be investigated, as he's never worked and is always home.”

This information was duly filed but never followed up, though Detective Bunce testified that it should have been assigned follow-up investigation. Ironically, follow-up by York Regional Police which scrutinized Guy Paul Morin as a potential suspect might have assisted Mr. Morin much later when he was forced to reconstruct (and try to document) precisely what he had done that day and when.

On December 27, 1985, Inspector Shephard of the Durham Regional Police Service reflected in his notebook that Detective Sergeant Nechay of York Regional Police advised during a meeting that day that he had previously provided Durham with Guy Paul Morin's name as a suspect. Inspector Shephard wrote in his notebook “Ha Ha. Bullshit.” Detective Sergeant Nechay denied that he had ever said anything to this effect. It is unnecessary for me to resolve this issue here.

(vi) Findings

The organization of this investigation in 1984 was flawed. No matter how well qualified investigators may be, an investigation need be structured to ensure that all leads are received, processed in a timely manner, indexed in a way that enhances the investigation, prioritized through the exercise of sound judgment, assigned in an efficient way with ongoing supervision of how and when the assignments are performed and what results they yield, together with regular meetings with investigators to ensure that the ‘larger picture’ can be seen. These things could not be said about this investigation. This resulted in missed opportunities, an inadequate investigation, at times, of potentially significant leads, and a failure to document important information. Inspector Wilson conceded some of these inadequacies and I was impressed by his candour.

As for the resort to psychics and a dowser, it has been said that no lead is too small to investigate. However, in the face of the important leads that were not investigated, these simply highlight the investigation’s lack of prioritization at times.

I cannot say, of course, whether the outcome of the investigation would have been different had the investigation been differently conducted. Would the true perpetrator have been apprehended? I do not know; nor does anyone else.

Having said that, I recognize that there have been significant changes in the organization and conduct of an investigation since then. The York Regional Police Services Board, drawing upon the evidence heard during Phase III of the Inquiry, made this submission:

As a result of dramatic improvements in technology and available resources, the ability of the York Regional Police to investigate major crimes has increased significantly since 1984. Officer Nechay was asked about these resources:

Q. Let me put it to you very simply: In your view, at least, were you satisfied that at time, resources were sufficient to handle the case load?

A. No.

Q. All right. In the years since then, have things changed in terms of resources?

A. Yes, the technology is improved vastly, we now have a major crime unit. We have an emergency response unit that's been trained to conduct search areas, so things have improved since then, greatly.

The most significant single advance in available resources has been the tremendous progress which has been made in computer software capabilities since 1984. Case management software with sophisticated search capabilities was not in use by police services in 1984 because the technology simply did not exist in its current form. Today, the York Regional Police have a computer system equipped with a case management software which automatically flags follow-ups on supplementary reports. Reports can be prioritized as they are inputted and the computer system will immediately bring any delays in following up on a report to the attention of the officer in charge of an

investigation.

In conjunction with computerized case management software, the York Regional Police now have a computerized system for creating supplementary reports which allows for direct voice entry. That is, police officers can call into the York Regional Police records investigation branch and have their reports transcribed directly into the force's computer system by the office personnel of that branch. This system eliminates the delays which were inherent in the creation and dissemination of manually-created reports.

The York Regional Police now have a Major Crimes Unit with the resources and trained personnel to respond to situations which are deemed to be major crimes.

The York Regional Police have established a canine unit and incorporated it into major crime investigations.

Although the York Regional Police established an excellent liaison with the various media outlets from a very early point in the Christine Jessop investigation, their ability to do so in future investigations has since been improved by establishing a full-time media officer who receives relevant training in the area. [Citations omitted.]

I accept that these changes reduce the likelihood that a number of the failings identified by me would recur.

One issue raised with me has been the adequacy of training and resources (other than technological) available to York Regional police officers. My recommendations address this issue.

D. Transfer of File from York Region to Durham

Between October 3, 1984 and December 31, 1984, York Regional Police officers prepared approximately 900 supplementary reports documenting their investigation.

On January 2, 1985, Detective Bunce gathered up the York Regional

binders and index books containing all supplementary reports of York Region and turned them over to the Durham Regional Police Service in Sunderland. York Region assigned an officer to assist Durham in the transfer of these files. A comprehensive discussion of the transfer of files and the issues arising from this transfer (relating to the use of the York reports) follows in the next chapter.

Two York Regional officers were seconded to assist Durham Region in its investigation up until April 22, 1985, when Guy Paul Morin was arrested. Officers Bunce and Nechay received their instructions from Inspector Brown at Durham or the detectives investigating the case. The two police forces also maintained ongoing contact in 1985.

E. Recommendations

Recommendation 70: Missing persons investigations

(a) Officers conducting a missing persons investigation must remain mindful of the possibility that such an investigation may escalate into a major crime investigation. This means, in the very least, that an accurate and complete record be kept of statements taken from relevant persons. This may also mean, under some circumstances, that potential evidence be immediately preserved from removal or contamination. It is inappropriate to direct, as a rule, when a missing persons investigation should be treated as a major crime investigation. This decision need remain within the discretion of the investigating or supervising officer.

(b) Police officers should be trained on how to respond to a missing persons investigation, where the possibility exists that such an investigation may escalate into a major crime investigation. Such training should draw upon the lessons learned at the Inquiry.

(c) The York Regional Police force's operating procedures have been amended to respond to the concerns raised by the Christine Jessop investigation. The Ministry of the Solicitor General should facilitate the creation of similar operating procedures for all Ontario police forces.

These recommendations largely track those made by the York

Regional Police Services Board and the York Regional Police Association.

The amended operating procedures for missing persons investigations contain these specific directions:

- Members shall be cognizant that a missing persons call may at some time become a crime scene. It is imperative that detailed notes and diagrams are made by officers attending the call.
- Obtain statement from reporting person in case criminal activities are later suspected.
- Record in memo book areas searched, diagrams of areas and persons who searched specific areas.
- If necessary, request Canine Unit assistance.
- Request a zone alert.
- Contact Public Affairs.
- Maintain a file on search-to-date actions.
- Have Command Post attend the scene.
- Liaise with Investigative Personnel during the investigation.
- Hold a debriefing session with parties involved in incident. Make recommendations on methods to improve search techniques. Forward report to Operations Commander. Review entire search effort to ensure that all reasonable efforts were made to locate the missing person.

The York Regional Police Association also noted this:

Despite any proposed changes respecting the procedure in missing persons investigations, adequate training to

teach officers how to recognize the signs and factors used in assessing a situation must be made mandatory. Without such training, any recommendations the Commission makes in this area will not be practical, nor will they be effective.

Recommendation 71: Conduct of searches

(a) Searches conducted during a missing persons investigation should be supervised, where feasible, by a trained search co-ordinator.

(b) Searches should generally be conducted in accordance with standardized search procedures, taking into consideration the particular circumstances of each case.

Again, this recommendation largely tracks the proposal of the York Regional Police Services Board. I do not intend to define further the appropriate procedures. This is better left to those with expertise in such searches. The York Regional Police Services Board proposed that the following measures could be prescribed whenever major searches are undertaken:

- The search should be co-ordinated by a single officer, who should direct all officers and participating civilians in order to ensure that the search is conducted in an orderly fashion.
- Each person participating in a search should be required to register at a central location where they would be required to provide their name, address and telephone number. It may be advisable to openly operate a video recording device at the volunteer registration table in order to assist with this process.
- Each volunteer should be assigned to a team of searchers consisting of not more than fifteen persons, with each team being assigned a police officer as team leader.

- The area to be searched should be marked out in a grid fashion and the search co-ordinator should direct each team leader to search a specified portion of the grid. The names of all individuals involved in searching each portion of the grid should be recorded.
- Searchers should be advised that any items located which may be associated with the missing person should not be touched or moved and should immediately be brought to the attention of the team leader. Each team leader should be equipped with a portable radio or telephone in order to notify the search co-ordinator of all such items found, and identification officers should be dispatched to examine, collect and catalogue the items in order to ensure that they are properly preserved as possible evidence.
- The search co-ordinator should ensure that all search team leaders submit detailed reports indicating the areas searched, any items located therein, and any relevant observations or unusual occurrences. The search co-ordinator should then ensure that the areas searched are marked off on a map of the overall search area.
- The search co-ordinator should be responsible for keeping the case manager apprised of the status of the search, any items which were found or information which was discovered.

Recommendation 72: Skills, Training and Resources

During this Inquiry, the York Regional Police Association expressed deep dissatisfaction over the lack of training and resources available to its membership. I was advised that the Association supported the need for an audit of the police force. The audit was filed as an exhibit at this Inquiry. It revealed matters of significant concern. This is what the Association had to say:

SKILLS AND TRAINING

22. It is unfortunate that lack of experience and training may have affected York Service's approach to the Jessop case. However, more alarming is the fact that the skills and training of the members of the York Service have not substantially improved since that time.
23. Although some procedural changes have been made for missing persons protocol, no real change to improve the skills and the training of the officers have been made since the time of the Jessop missing person case. Nor has there been any real improvement to the resources and the technological equipment made available to York Service officers.
24. In the fourteen years since the Jessop disappearance, Durham Region appears to have responded to the need for better training and skill development, and have actually implemented programs and designated resources and budgets to improve their training programs and facilities. In York however, although the population has grown exponentially, the York Service has not implemented any significant changes to their training program or kept up with the growing needs of the community for specialized units.
25. The YRPA has always been concerned by the lack of resources and training that has been made available to its membership. It has continuously lobbied for a larger training budget and more training programs to be made available to the officers. The York Service has not responded positively to requests for better training, and in fact have actually reduced the budget for training.
26. The YRPA has requested computer equipment and better technology to assist officers in their investigations. For many years, York Service did not provide or upgrade the equipment, leaving the officers at York Service with little or no ability to efficiently operate their investigations. Recently, they have significantly improved their computer system.

27. It was due to this lack of changes in training and equipment that the YRPA requested and ensured that an audit of the York Service be conducted under the *Police Services Act*. They requested the audit in order to prompt some action by York Service to improve the state of training and other procedural deficiencies in the force. The Inspection Report of the York Regional Police Service dated May 1997 ("the Audit") are the findings of the Police Services Advisors after conducting a three month on site inspection of the state of the operations and practices of the York Service. With respect to the training and technology for York Service, the Audit states,

"Notwithstanding [the] overall assessment of policing at the front line, there are a number of critical issues that need to be addressed. **Primary amongst these is the need for additional resources in certain specialized areas of service. ... a need to address the allocation of existing resources. ... [t]echnological upgrades are also urgently required.**"

28. The specific findings about training were even more critical. The only positive comment that the audit had regarding training was in relation to York Service's Firearms Training facilities which were "state-of-the-art" and the Use of Force Training programs.
29. It is highly significant that the one area of training in which York Service received a positive review is also one of the few areas in which there are mandatory provincial standards. Clearly, the only way to ensure adequate and up-to-date training is to create mandatory provincial standards.
30. The balance of the auditors' findings were negative, including the finding that the Training Branch was poorly trained and inadequately funded.

"A training needs strategy should be developed with appropriate resources

provided by the Police Services Board to ensure its goals are met. It is essential that the trainers themselves are provided with appropriate training.

.....

The Training Branch is responsible for the delivery of all mandated training as well as courses selected by the administrator of the Police Service. ... Members assigned to delivery of academic subjects ... do not feel that they have been provided with appropriate formal training/education, to effectively deliver some courses of study. ... Additionally, concern was expressed ... that they are inadequately funded and **that training is generally not a high priority with the management of the police force.**"

31. The Audit also found that the Training Branch was **"inadequately equipped, and that much of the resource material is outdated.** Members of the branch were unaware of the Ministry Policing Standards (except Use of Force) although they were required to teach subjects that are covered by the standards." Further, the audit found,

"Of particular concern to the members of the inspection team is the apparent *reluctance* to send members of the Police Service to accredited courses at the Ontario Police College and Canadian Police College. Records at the Ontario Police College revealed that few members of York Regional Police force have attended accredited courses *unless mandated*."

32. In fact, the audit found that any upgrading of qualifications was self-initiated and self-funded by individual officers and not by the York Service, as no resources were budgeted for self-initiated programs. For the YRPA the finding by the audit that, **"appropriate training is perceived by the**

members to be a *luxury* because of fiscal constraints” speaks volumes about the inability of York Service to provide adequate training in the absence of mandatory provincial standards.

33. It is unacceptable that training be considered a luxury. Training is a necessity and an essential part of the proper development of a strong force. Proper budget allocation and the importance of training must be emphasized by the Commission. Further, it is not sufficient to simply make recommendations, mandatory standards must be set and enforced to ensure compliance by management. Past experience has demonstrated that there is no assurance that positive changes will be made without the establishment of mandatory provincial standards.
34. The YRPA places significant emphasis on their submission that the Commission recommend mandatory provincial standards since it is clear that in the absence of such standards budgeting and other factors may result in the continued inadequate training of officers. If training is not mandated, no money will be made available for it, as training is always one of the first expenses which is cut from the budget.
35. If we rely only on Police Services Boards to decide what priority they will place on training, then, without mandatory guidelines and standards, there will be no uniformity in the skills level and the service of police forces across the province. The difference between the Durham Service and York Service approach to training is a perfect example of what can happen in the absence of mandatory provincial standards.
36. Waiting for all the stakeholders to develop their own standards is also not a plausible alternative. In the most recent attempt to develop Adequacy and Effectiveness standards, the Solicitor General, Attorney General, Senior Officers Association and the Police Association of Ontario were all willing to meet and discuss the setting of standards. However, the Chiefs of Police and the Police Service Boards, the very people who would

implement the programs, walked out of the discussions stating that they could not agree to the standards being negotiated. They cited budgetary issues as the key reason that they were walking out of the consultations.

37. The YRPA is afraid that nothing will change unless the Commission recommends and the province implements mandatory provincial standards. The audit is a perfect example of what will happen to recommendations for change that are not mandatory. The Audit resulted in 65 recommendations for change and improvement in the force. To date, there have been significant improvements in the areas of computerization and technology. However, there has been little change with respect to the provision of training.
38. The YRPA is aware the budget limitations are a major barrier to improvements. Provincial funding cuts continue to force the Police Services of this province to find ways to cut their budgets. This cannot continue to happen. In order to ensure that the implementation of mandatory provincial standards for training does not affect or compromise other essential police services the Commission must also recommend that additional provincial funding accompany the changes to training.
39. The people of Ontario cannot afford to have police forces learn by experience. This is an ineffective and dangerous method of ensuring police have the proper skills and abilities to perform their duties. The only way to guarantee that police receive proper training is to set mandatory provincial training standards.
40. As such, the YRPA urges the Commissioner to make positive recommendations for new mandatory provincial standards for training and resource allocation in order ensure that police forces across the province are properly trained, in both basic and specialized techniques, and that they have the proper equipment and resources available to them in order to provide adequate and effective policing. The failure to create such

standards would permit the status quo to continue. If the status quo continues, this inquiry will have failed to serve a useful purpose.

41. The YRPA recommendations on skills and training include:

- R1. That the Provincial government set mandatory provincial standards respecting the training of officers which set adequacy and effectiveness standards that all police services must meet; and, that the province ensure that necessary funding is available to enable police services to comply with these standards.
- R2. That mandatory provincial standards include yearly courses in basic skills and procedures to be taken at designated sites, including the Ontario Police College or the Canadian Police College, and if necessary accredited international centres.
- R3. That mandatory provincial standards require that each police service have specialized units in identification, scene of crime, homicide and missing persons and that mandatory goals be set for the year 2000 for the numbers of trained personnel which should be available in each unit. (Citations omitted.)

York Regional Police Services Board also addressed the training and resources issue:

Criminal investigative techniques are constantly evolving, and it is important for all police services to have competent, well-trained officers carrying out the duties which have been assigned to them. Training should be viewed as an ongoing process, and should continue after an officer has become an investigator to ensure that all officers are kept up to date on new laws, procedures, investigative techniques and police technology. However, such training comes at a cost, both in direct financial terms and in terms of the lost officer time which occurs while the training is taking

place, and these costs can discourage police services from undertaking as much training as would otherwise be desirable. As noted in the Campbell Report, when police budgets are pruned, training is often the first thing to be cut.

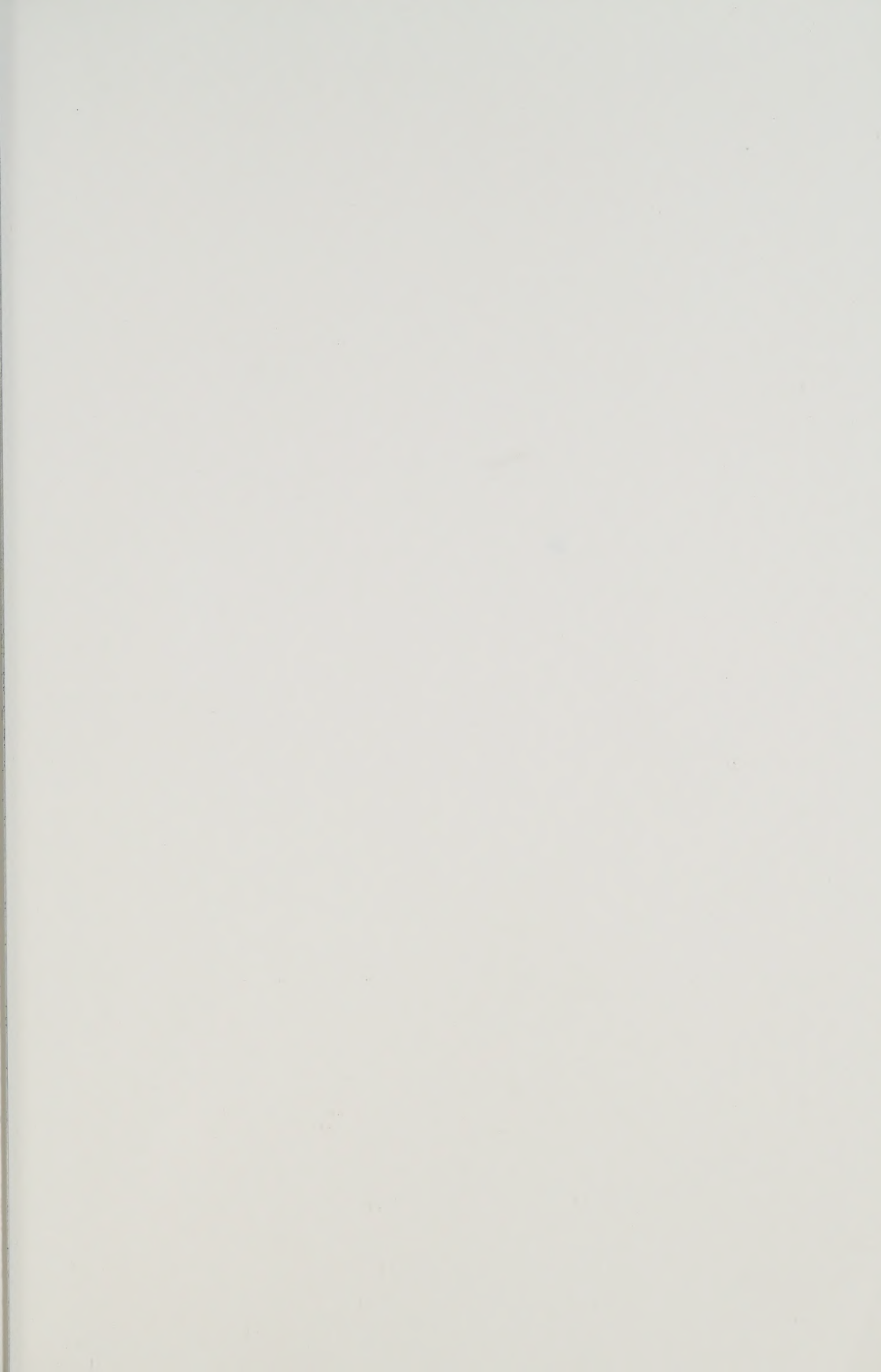
The most direct way to improve police training would be to expand the province-wide minimum training requirements which are established by the Ministry of the Solicitor General. These standards could include mandatory training requirements for officers assigned to specified duties, as well as individual service minimums in terms of the number of officers who must be trained for certain specialized purposes. However, minimum training standards should not be set without ensuring that police services will be able to meet those standards without compromising other aspects of their operations. In particular, actual criminal investigative resources should not suffer because of increased training requirements established by the Province. One way to ensure that this does not occur would be to accompany such increased minimum training standards with additional provincial funding which is earmarked for such purposes, as is currently done for other policing matters assigned a high level of priority by the Province, such as the provincial R.I.D.E. program.

In a later chapter I recommend that the Province of Ontario enact minimum policing standards in a number of areas. Here I need address the additional concerns raised by the York Regional Police Association. The lessons which may be learned from this Inquiry by police officers will mean little if the rank and file police officers are not taught them. The practices and procedures recommended by me in this Report will mean little if officers are not trained in their use. The dangers identified in the conduct of police investigations will have been identified for nothing if officers remain unaware of them.

(a) Rank and file officers need be educated and trained on a continuing basis on a wide range of investigative skills. Their educators need themselves be fully trained in these skills and in their communication to others. Financial resources need be available, secure from erosion for operational purposes, to ensure that training for all Ontario police forces is state-of-the-art.

(b) Attention should be given by the Government of Ontario, on a priority basis, to the specific concerns identified by the York Regional Police Association and the audit of the York Regional Police force. The Government of Ontario should publicly announce the measures being taken to address the concerns raised.

The Ontario public, and the people of York Region in particular, have been told by the York Regional Police Association, representing the officers of that region, that their situation is 'alarming' and that their skills and training have not significantly improved in the last 15 years, despite their own motivation for improvement. I am in no position to evaluate how the York Region police officers compare to other Ontario jurisdictions. However, an 'alarm bell' has been rung in York Region. The public must have confidence that the bell will be answered.





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